Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

INITIAL COMMENTS OF BELLSOUTH CORPORATION

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BellSouth Corporation ("BellSouth"), for itself and its wholly owned affiliated companies, respectfully submits its initial comments in response to the *Notice.*[1]

I. INTRODUCTION

This is the fourth attempt by the Federal Communications Commission ("Commission") to adopt lawful unbundling rules consistent with the Telecommunications Act of 1996 ("1996 Act"). With some or all of the Commission's three prior sets of unbundling rules having been invalidated by the courts, the industry has been left to operate for the past eight years under an unlawful unbundling regime.

The *Notice* gives the Commission and the industry an opportunity for a fresh start. By taking to heart the directives of the Supreme Court and the United States Court of Appeals for the D.C. Circuit, the Commission can and must adopt lawful unbundling rules that comply fully with the letter and spirit of the 1996 Act. In doing so, the Commission should be guided by four general principles.

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[1] *Unbundled Access To Network Elements; Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Notice*" or "*Interim Order*").

First, any unbundling rules adopted by the Commission must be narrowly tailored to address those circumstances when competitive local exchange carriers ("CLECs") are genuinely impaired. If anything has been learned from the past eight years of litigation and regulatory uncertainty it is that the maximum unbundling approach to which the Commission has previously adhered is legally unsustainable. In this proceeding, the Commission must confine its unbundling requirements to those bottleneck facilities that cannot reasonably be duplicated.[2]

Second, the Commission should adopt unbundling rules that promote facilities-based competition. As Congress recognized, and as this Commission has repeatedly observed, facilities-based competition promotes innovation and investment, which benefit consumers.[3] The Commission must put an end to the "completely synthetic competition" that has been the

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[2] In *United States Telecom. Ass'n. v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003), a unanimous panel of the D.C. Circuit (Williams, J., joined by Edwards, C.J., and Randolph, J.) overturned the Commission's second attempt to craft unbundling rules. The essential thrust of the court of appeals' decision in *USTA I* was that the Commission had failed to conform its rules to the principles of *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366 (1999), as reinforced by *Verizon Communications v. FCC,* 535 U.S. 467 (2002), in which the Supreme Court stressed that unbundling should apply only to "bottleneck" or "very expensive to duplicate" facilities, not to the entire narrowband network of the incumbent local exchange carrier ("ILEC"). *Id.* at 510 & n.27.

[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17025, ¶ 70 (2003) ("*Triennial Review Order*"), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending, NARUC v. United States Telephone Ass'n,* Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004) ("[w]e reaffirm the conclusion in the UNE Remand Order that facilities-based competition serves the Act's overall goals"); *and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3757-60, ¶¶ 134-139 (1999) ("*UNE Remand Order*"); *also Notice,* ¶ 2 ("[w]e believe that unbundling rules based on a preference for facilities-based competition will provide incentives for both incumbent LECs and competitors to innovate and invest . . . as we initiate this remand proceeding, we renew our commitment to promoting the development of facilities-based competition and seek to develop unbundling rules that will achieve this end.").

hallmark of the Commission's prior unbundling regimes, which promotes neither innovation nor investment.[4]

Third, the Commission's unbundling rules must provide certainty. The industry has been operating for too long under a cloud of doubt created by increasingly complex legal rules that proved difficult, if not impossible, to implement. This time around, the Commission must adopt a lawful impairment test and apply that test to the facts in the record, thereby defining precisely those facilities that must be unbundled consistent with the requirements of the 1996 Act and identifying with specificity those markets, if any, where the impairment test has been met. At the end of this proceeding, it is imperative that ILECs, CLECs, and their respective shareholders know which network elements must be unbundled and where such elements must be made available on an unbundled basis.

Finally, the Commission's inquiry in this proceeding should be limited to those issues that were remanded by the D.C. Circuit in *USTA II* in its review of the Commission's *Triennial Review Order.* The Commission should decline any invitation to revisit the Commission's prior unbundling decisions such as broadband and line sharing, which have been affirmed by the D.C. Circuit. There is no justifiable reason or any legal basis for the Commission to revisit such issues at this juncture, particularly when this proceeding was initiated to implement unbundling obligations "in a manner consistent with" the decision of the D.C. Circuit.[5] To the extent any party has been aggrieved by the Commission's unbundling decisions that were affirmed by the

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[4] *USTA I*, 290 F.3d at 424; *see also Triennial Review Order,* 18 FCC Rcd at 17505, Separate Statement of Chairman Michael K. Powell at 2, (noting that the unbundled network element platform (or "UNE-P") allows CLECs to "resell the entire incumbent's network, at heavily discounted rates set by regulators, without having to provide anything in the way of [their] own infrastructure").

[5] *Notice,* ¶ 1.

D.C. Circuit, their remedy lies with the United States Supreme Court, and not another bite at the unbundling apple in the context of this proceeding.

II. SUMMARY

The Commission must adopt a narrow and rational impairment standard consistent with the 1996 Act. In so doing, the Commission should find that CLECs: (1) are not impaired without access to unbundled circuit switching; (2) are not impaired without access to unbundled high-capacity loops, transport, and dark fiber in any central office with 5,000 or more business lines; and (3) are not entitled to obtain entrance facilities on an unbundled basis.

Because carriers that are using special access are not impaired without access to the same facilities on an unbundled basis, the Commission should prohibit carriers from converting special access to UNEs. The Commission also should not allow the unbundling of facilities used to provide wireless or interexchange services. At the same time, the Commission should adopt restrictions on the use of Enhanced Extended Links ("EELs") to ensure that such facilities are not used to provide services for which there has been no showing of impairment and for which no showing could be made.

The Commission should clarify that Section 271 imposes no obligations on BOCs to unbundle "next generation," "broadband," or other advanced telecommunications and information service aspects of their networks. The Commission should further clarify that states have no authority to impose unbundling obligations of any sort on Bell Operating Companies ("BOCs") pursuant to Section 271.

Finally, the Commission's proposed transition plan should represent the absolute outer limits of any transition plan that the Commission can or should adopt in this proceeding, and the second 6 month plans of the current transition plan should take effect immediately within 30

days after publication of its new rules in the Federal Register, which should be no later than January 31, 2005. Further, the Commission should clarify, as part of its transition plan, that: (1) states have no authority under federal or state law to order unbundling of an element for which the Commission has determined there to be no impairment; and (2) ILECs and carriers may negotiate access to ILEC network facilities that do not satisfy the impairment standard through commercial agreements that may be made publicly available pursuant to Section 211(b), but need not be filed with, or approved by, any regulatory authority.

BellSouth's comments are structured as follows: in Section III of its Comments, BellSouth outlines the background of this proceeding. In Section Four, BellSouth will propose an impairment standard that is consistent with the 1996 Act as interpreted by the United States Supreme Court and the D.C. Circuit.[6] BellSouth will apply this impairment standard to switching in Section Five of its comments. In Section Six, BellSouth will address its hot cut process. Section Seven addresses the impairment standard in connection with high capacity transport, loops, and dark fiber. In Section Eight, BellSouth's comments will address other issues raised in the *Notice*, including the consideration of entrance facilities and EELs. Section Nine will address the impact of Section 271 on the Commission's unbundling decisions. Finally, in Section Ten BellSouth will explain the reasons for its position that no additional transition period beyond that adopted in the Commission's August 20, 2004 *Order and Notice of Proposed Rulemaking* is warranted in implementing any new rules adopted in this proceeding.

[6] Consistent with the *Notice,* BellSouth contemporaneously files with these Comments copies of supporting material in an appendix. This material includes evidence from state proceedings and the Triennial Review proceeding to the extent it is relevant. In addition, BellSouth includes affidavits with additional data. Citations to material from BellSouth's appendix will refer to "BellSouth App." and citations to affidavits will refer to the Affiant's last name, "Affid.," and the relevant paragraph number and/or affidavit exhibit.

III. BACKGROUND

As the Commission recognized in the *Notice*, the crafting of lawful unbundling rules must start with *USTA II*. In *USTA II*, the D.C. Circuit vacated certain rules adopted in the *Triennial Review Order* regarding the unbundling of narrowband facilities.

In the *Triennial Review Order*, a 3-2 majority of the Commission made provisional findings of nationwide impairment for both mass-market switching and high-capacity facilities (including both the transmission facilities that connect BellSouth switches and the loops that connect switches to larger customers). It then expressly "delegated" to 51 separate commissions the duty to make the ultimate determination of which network elements must be made available. These state decisions were to be effective without any review or approval by the Commission.[7]

More particularly, for "mass-market" switching,[8] the Commission made a provisional finding of nationwide impairment pending the state determinations, based solely on supposed difficulties with the "hot-cut" process by which a loop is transferred from an incumbent's switch to a competitor's switch. The Commission then gave state commissions nine months to determine whether to mandate switch unbundling on a permanent basis. During that time, state commissions were to apply a two-stage analysis. First, the state commissions were to find "no impairment" when either "three or more unaffiliated competing carriers each is serving mass market customers in a particular market with the use of their own switches" or "two competitive

[7] *Triennial Review Order*, 18 FCC Rcd at 17096-98, 17242, ¶¶ 188-90, 426.

[8] The "mass market" includes residential and small-business customers. The Commission did not require switch unbundling for large-business "enterprise" customers – a determination that was affirmed by the D.C. Circuit. *See USTA II*, 359 F.3d at 587.

wholesale providers" of switching are serving the market.[9] The Commission left it to the states to "define the markets in which they will evaluate impairment."[10] If this first test was not satisfied, the states were next to determine the potential ability of CLECs to deploy their own switches based on a number of criteria.

The Commission employed a similar approach for transport facilities and high-capacity loops. The Commission made provisional findings of *nationwide* impairment on the ground that it could not determine the *specific routes* on which CLECs had deployed such facilities. The Commission then again delegated to the states the authority to make the ultimate unbundling determinations according to another two-stage inquiry. At the first stage, states were to grant relief from unbundling only if multiple alternative providers had already deployed facilities on a specific point-to-point route or to a specific building. At the second stage, states were to use their "analytical flexibility" to consider a long series of factors and determine whether CLECs could deploy facilities at locations where they have not already done so.[11]

On March 2, 2004, the D.C. Circuit vacated the Commission's narrowband unbundling rules. The Court of Appeals did so not only because the Commission had wrongly purported to delegate ultimate unbundling determinations to the states, but also because the Commission's

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[9] *Triennial Review Order,* 18 FCC Rcd at 17296-99, ¶¶ 501, 505.

[10] *Id.* at 17291-92, ¶ 495.

[11] *Id.* at 17167, 17176, 17179, ¶¶ 314, 329, 335. In contrast to its decision to maintain maximum unbundling for traditional narrowband voice facilities, the Commission decided to impose limited unbundling obligations on most facilities used to provide high-speed broadband services. For example, subject to a transition period, the Commission freed incumbents from the obligation to offer "line sharing," found that CLECs are not impaired without access to the next-generation fiber to the home (or "FTTH") facilities, and, with respect to hybrid loops, required ILECs to provide a narrowband transmission path to CLECs, but not to turn broadband capabilities over to their competitors. The D.C. Circuit affirmed the Commission's decisions on these issues. *See USTA II,* 359 F.3d at 582, 584.

nationwide impairment findings for switching and high-capacity facilities (transport, high-capacity loops, and dark fiber) were substantively deficient in multiple respects.

As to switching, for example, the D.C. Circuit stated that the Commission had failed to consider "several more narrowly-tailored alternatives" that would fully address the its lone purported basis for finding impairment on a provisional basis (the hot-cut process).[12] Moreover, "[a]fter reviewing the record," the Court of Appeals expressed its "doubt that the record supports a national impairment finding for mass market switches."[13] Indeed, the D.C. Circuit pointedly noted that the Commission could not possibly justify nationwide impairment findings as to switching because the record evidence "indicated the presence of many markets where CLECs suffered no impairment in the absence of unbundling."[14]

The Court of Appeals likewise concluded that the Commission's impairment findings as to high-capacity facilities could not be sustained. Again, the Court of Appeals found that the Commission had unlawfully delegated authority to state commissions to make impairment determinations. But the D.C. Circuit held that the Commission also had acted unlawfully both by "ignor[ing] facilities deployment along similar routes when assessing impairment" and by refusing to "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired."[15] And the Court of Appeals again indicated that *nationwide* unbundling obligations could not be justified on this agency record: "[A]s with mass market switching, the Order itself suggests that the Commission doubts a national impairment

[12] *USTA II,* 359 F.3d at 570.

[13] *Id.* at 569, 570.

[14] *Id.* at 587.

[15] *Id.* at 575, 577.

finding is justified on this record."[16] Indeed, according to the Court of Appeals, the Commission had "frankly acknowledged that competitive alternatives are available in some locations" for these network elements.[17]

IV. THE IMPAIRMENT STANDARD

A. The Impairment Standard Must Determine Where "Competition Is Possible" Without Access to Unbundled Network Elements.

Impairment is the "touchstone" to any unbundling determination.[18] Because of "the costs of unbundling (such as discouragement of investment and innovation) ... the Commission is obliged to apply a limiting standard of impairment, rationally related to the goals of the 1996 Act."[19] Moreover, the Commission must "make specific, affirmative findings that elements

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[16] *Id.* at 574.

[17] *Id.* (internal quotation marks omitted). Some CLECs have claimed that the D.C. Circuit did not vacate the Commission's rules requiring nationwide unbundling of high-capacity loops. In the *Notice,* the Commission assumed, without deciding, that the Court had done so. *See Notice,* ¶ 1, n. 4. But the D.C. Circuit clearly stated that it was vacating *all* of the Commission's delegations of impairment determinations to the states. *See USTA II,* 359 F.3d at 568. And the Commission unquestionably made such a delegation in the context of both high-capacity loops and transport. *See Triennial Review Order* 18 FCC Rcd at 17175-76, 17223-24, ¶¶ 327-328, 394. Moreover, the D.C. Circuit defined the term "transport," as used in the opinion, to refer to "transmission facilities dedicated to a single customer," which the Commission defines as "loops," as well as to facilities dedicated to a "carrier," which the Commission defines as "transport." *USTA II,* 359 F.3d at 573; 47 C.F.R. § 51.319(a), (e). The Court's treatment of high-capacity loops and transport was consistent with the manner in which the incumbents briefed the issue, by addressing both simultaneously. *See* Brief for ILEC Petitioners and Supporting Intervenors at 31-35, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004); Reply Brief for ILEC Petitioners and Supporting Intervenors at 15-17, Nos. 00-1012 *et al.* (D.C. Cir. filed Jan. 16, 2004). And the two substantive flaws the D.C. Circuit identified with respect to the Commission's analysis of high-capacity facilities – considering impairment at on a route-specific basis and the failure to consider the availability of special access, *see USTA II,* 359 F.3d at 575, 577 – apply equally to the Commission's determinations as to both loops and transport, *see Triennial Review Order* 18 FCC Rcd at 17047-48, 17177-78, 17182-84, 17227-28, 17230-31, ¶¶ 102, 332, 341, 401, 407.

[18] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 427-428; 391 (1999) (*"Iowa Utils. Bd."*); *USTA I,* 290 F.3d at 423; *USTA II,* 359 F.3d at 580.

[19] *USTA II,* 359 F.3d at 572.

should or should not be unbundled."[20] It is insufficient to simply outline a conceptual framework in broad brushstrokes and then allow others to fill in the blanks. This proceeding requires clear and unambiguous answers to the unbundling questions currently confronting the Commission.

To provide the unambiguous answers that the 1996 Act demands, the Commission must determine "whether a market is suitable for competitive supply," which requires an inquiry into whether "competition is possible" without access to unbundled network elements ("UNEs").[21] A market is obviously "suitable for competitive supply" when competitive facilities already have been deployed. Thus, record evidence demonstrating the existence of 1,200 CLEC circuit switches, 8,700 CLEC packet switches, 19 CLEC networks in each of the top 50 Metropolitan Statistical Areas ("MSAs"), 324,000 miles of fiber optic cable and 32,000 on-net buildings has meaning and cannot be simply wished away.[22] Such evidence is "dispositive" and not merely "probative" of whether competitive entry is possible without access to UNEs.[23]

Furthermore, competition is possible even in markets where competitors have yet to deploy facilities (or have deployed them to a lesser extent). In such circumstances, the Commission cannot merely conclude that the absence of competitors is "proof" of impairment; instead the Commission must consider whether competition is possible by considering competitive deployment in "similarly situated" markets.[24]

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[20] *Triennial Review Order* 18 FCC Rcd at 17026-27, ¶ 72.

[21] *USTA II,* 359 F.3d at 571.

[22] *UNE Fact Report 2004*, Section I, Table 1. This nationwide CLEC circuit switch total is based on an estimate from New Paradigm Resources Group, Inc. As explained in the Affidavit of Ms. Pamela A. Tipton, and in Section IV, C, *infra,* BellSouth includes its calculation of CLEC circuit switches in its region using more inclusive filtering criteria.

[23] *Triennial Review Order,* 18 FCC Rcd at 17042-43, ¶ 94.

[24] *USTA II,* 359 F.3d at ¶ 575.

In assessing whether competition is possible in a market without access to UNEs, the Commission also must take into account intermodal competition. As the D.C. Circuit held in *USTA I* and expressly reaffirmed in *USTA II,* "the Commission cannot ignore intermodal alternatives" in evaluating the state of competition.[25] In particular, the Court of Appeals noted that the presence of "robust intermodal competition" would ensure that "mass market consumers will still have the benefits of competition," regardless of the degree to which CLECs using unbundled network elements were present in the market. As the D.C. Court concluded, "[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling."[26]

There can be no serious dispute that real and robust intermodal competition pervades the industry.[27] For example, 87% of homes have access to cable modem service, 97% of the population lives in counties with three or more wireless providers, 88% of the population lives in counties with five or more wireless providers, 11 million wireless subscribers have cut the wireline cord, and 17 million homes have access to circuit switched cable telephony.[28] The Commission must do more than blithely acknowledge the existence of such alternatives, but then accord them lesser "weight." Nor should the Commission limit consideration of intermodal alternatives by comparing newer technologies against the cost, quality, and maturity of ILEC services. Doing so would be flatly contrary to the Commission's pledge to adopt rules that

[25] *Id.* at 572-573.

[26] *Id.* at 576.

[27] *E.g., USTA II,* 359 F.3d at 572-573.

[28] *UNE Fact Report 2004* at Section I, Table 1.

reflect "current conditions in particular markets."[29] There is no doubt that intermodal alternatives exist and are flourishing, and it makes no sense to minimize such competitive alternatives by comparing newer technologies against the "maturity" of traditional ILEC services.

B. The Impairment Standard Must Address the Concerns Raised in *USTA II*

In *USTA II* the D.C. Circuit took the Commission to task for including in its impairment definition a factor – whether enumerated operational and entry barriers "make entry into a market uneconomic" – that was so "vague almost to the point of being empty."[30] The Court of Appeals admonished the Commission to explain the standard by which entry is judged to be "uneconomic" or not.

In those markets where competitive entry has occurred, whether by CLECs or intermodal competitors, such entry must be presumed to be "economic," and there is no need to wade into the amorphous concepts inherent in cost studies and business modeling. [31] However, to the extent any economic analysis must occur, it should be conducted by the Commission to assess whether competitive entry is "uneconomic" from the perspective of an efficient CLEC, and not a

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[29] Brief for Respondents at 1, *USTA et al. v. F.C.C. et al.,* No. 01-1012 (D.C. Cir. filed Sept. 16, 2004) (FCC's brief filed in opposition to writ of mandamus stated that in this proceeding it "must adopt new unbundling rules that reflect a nuanced and comprehensive analysis of competitive impairment under current conditions in particular markets").

[30] *USTA II,* 359 F.3d at 572.

[31] Indeed, in the *Triennial Review Order* 18 FCC Rcd 17046, ¶ 99, the Commission explained that the consideration given to cost studies, business case analyses and modeling, while useful, was less relevant than actual marketplace evidence. In relevant part the Commission acknowledged actual marketplace evidence demonstrated as a practical matter that new entrants had surmounted barriers to entry. In addition, studies were "difficult to verify" and "easily manipulated." Finally, the Commission acknowledged factors affecting a competitor's ability to enter the market are difficult to foresee.

particular CLEC or even an "average" or "representative" CLEC.[32] Judging competitive entry based on an efficient CLEC is consistent with (but more realistic than) the approach embodied in the Commission's TELRIC pricing rules.[33] An efficient CLEC standard also is consistent with the position taken by CLECs themselves.[34] Thus, if the Commission applies controlling benchmarks and standards to assess economic market entry, such benchmarks and standards should presume an efficient CLEC deploying an efficient network architecture using the most current technology, while pursuing all potential revenue opportunities and taking all steps necessary to satisfy customers and reduce churn.[35]

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[32] *See USTA II,* 359 F.3d at 572. As discussed in detail in Sections VII and VIII, with respect to wireless and long distance carriers and for certain high-capacity services, economic competitive entry has occurred through the use of tariffed special access services, which is fatal to any finding of impairment. *See USTA II,* 359 F.3d at 576 ("[w]here competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.").

[33] *See* 47 C.F.R. § 51.505(b)(1).

[34] *See, e.g.,* Letter from David W. Carpenter, Counsel for AT&T Corp., to Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, Nos. 00-1012 (filed Jan. 29, 2002) (acknowledging that, in determining impairment, an efficient CLEC "is inherent" in the analysis).

[35] The Commission must reject any attempt by CLECs to argue against cost assumptions they extolled in UNE cost proceedings or to disavow statements made in other state proceedings. *See* BellSouth App. at 1. *Compare* FPSC Docket No. 030852-TP, Rebuttal Testimony of CompSouth witness Gary J. Ball (criticizing BellSouth's use of cost information used to develop TELRIC rates in Florida in potential deployment analysis and claiming that an evaluation of costs "specific to CLECs" is required) *with* GPSC Docket No. 14361-U, Direct Testimony of AT&T witness Brian F. Pitkin (seeking 6.25% reduction in Georgia UNE rates); *also* GPSC Docket No. 5825-U, Direct Testimony of SECCA witness Joseph Gillan ("[t]he fundamental calculus determining a customer's profitability is the . . . total revenue from the family of services that it purchases. This calculus applies equally to the incumbent and new entrant. The financial attractiveness of a customer is decided by the totality of service it purchases . . . ."). Likewise, the Commission must remain vigilant to CLEC gamesmanship that would only seek to undermine any economic standard by: (1) proffering an economic model that disregards completely any revenue opportunities; BellSouth App. at 2; (2) claiming that CLECs face a "tremendous disadvantage" and that economic predictions are "inherently uncertain;" BellSouth App. at 3; and (3) arguing that it is incumbent on the ILEC to meet a "burden of proof" to establish that CLECs are not economically impaired. BellSouth App. at 4.

Assessing economic entry from the perspective of a particular CLEC or an "average" CLEC would reward inefficiency. It also would make it difficult for the Commission to distinguish uneconomic entry from poor business planning or regulatory gamesmanship.[36]

In *USTA II* the D.C. Circuit again held that the Commission cannot find impairment simply because retail rates have been held below historic costs in order to preserve universal service.[37] In the *Triennial Review Order,* below-cost retail rates were not listed as one of the enumerated barriers to entry, yet in the improper delegation to the states, universal service support was listed as a factor for consideration.[38]

There is no reasonable basis for including universal service subsidies as an impairment factor. Such inclusion effectively penalizes those carriers willing to shoulder the carrier of last resort responsibility without any corresponding ability to recoup the profits lost to carriers that "cream-skim" by selectively providing service only to the most lucrative customers. In an ideal world, there would be a concrete solution to this dilemma. In the real world, there are no such easy or quick fixes, and the Commission should simply decline to include universal service subsidies in assessing impairment.

C. Implementation of the Impairment Standard

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[36] For example, although AT&T and MCI have gone to great lengths to announce a retreat from the local service market due to the uncertainty surrounding the availability of the unbundled network element-platform ("UNE-P"), AT&T has simply shifted its strategy to VoIP and continues to market local circuit-switched service and VoIP via its website. Tipton Affid. ¶ 32. Likewise, MCI's website continues to assert that "The Neighborhood is now available in all 48 contiguous states plus Washington, DC, making MCI the first nationwide local phone company." *See* http://consumer.mci.com/TheNeighborhood/res_local_service/.

[37] *USTA I,* 290 F.3d at 422; *USTA II,* 359 F.3d at 573.

[38] *Triennial Review Order,* 18 FCC Rcd at 17305, ¶ 518.

As the D.C. Circuit correctly recognized, any impairment standard "finds concrete meaning only in its application."[39] To develop such concrete meaning, BellSouth demonstrates below how a narrowly defined impairment standard can be properly applied to the specific individual elements remanded by the D.C. Circuit. Through the proper application, the Commission can determine precisely whether carriers are genuinely impaired without unbundled access to switching and high capacity transport, loops, and dark fiber and, if so, where such impairment exists.

V. LOCAL CIRCUIT SWITCHING

In *USTA II*, the D.C. Circuit vacated this Commission's national impairment finding concerning mass market switching. The D.C. Circuit explained that the Commission had essentially ignored specific markets, going so far as to state that "the Commission's own conclusions do not clearly support a non-provisional national impairment finding for mass market switches."[40] As discussed below, the proper application of the impairment standard conclusively demonstrates that switching is suitable for competitive supply and that CLECs are not impaired without access to unbundled local switching from BellSouth.

A. Switching Is Suitable for Competitive Supply for Both Enterprise and Mass Market Customers

In turning to switching, the Commission must reconcile its finding – upheld on review – concerning the existence of widespread switch deployment to serve the "enterprise" market with its conclusion that CLECs were impaired in self-providing switching to mass-market customers.[41] The Commission's mass-market switching conclusion rested solely upon the

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[39] *USTA II*, 359 F.3d at 572.

[40] *Id.* at 569.

[41] *Triennial Review Order*, 18 FCC Rcd at 17258-59, ¶ 451.

"need for hot cuts," which is addressed below.[42] Besides the Commission's prior (and incorrect) conclusion concerning hot cuts, the evidence demonstrates that any alleged distinction between switching used to serve enterprise customers as compared to switching used to serve mass market customers is artificial. Because the same CLEC switches can and do serve both mass market and enterprise customers, any alleged barriers to entry have been overcome. In addition, and perhaps more compelling, the rapid advances in intermodal alternatives mandate both an extension of the no unbundling decision to all circuit switching as well as an eradication of the fictitious enterprise/mass market distinction.

In its *Triennial Review Order* this Commission found "the record ... does not contain evidence identifying any particular markets where competitive carriers would be impaired without access to local circuit switching to serve enterprise customers."[43] The D.C. Circuit affirmed the Commission's finding, acknowledging the evidence showed an absence of *any* impairment.[44] The Commission also created a "safety valve" by which state commissions could rebut the national finding of no impairment.[45] In BellSouth's region, only one CLEC challenged the no impairment finding, which was rejected out of hand by the Kentucky Public Service Commission.[46] No other challenges occurred in BellSouth's serving territory, which aptly

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[42] Brief for the Federal Respondents at 9-10, *NARUC v. United States Telephone Ass'n,* Nos. 04-12, 04-15 & 04-18 (S. Ct. filed Sept. 1, 2004) (FCC's brief stated it found CLECs were generally impaired absent unbundled mass-market switching because they could not use their own switches without hot cuts).

[43] *Triennial Review Order,* 18 FCC Rcd at 17260, ¶ 455.

[44] *USTA II,* 359 F.3d at 587.

[45] *Triennial Review Order,* 18 FCC Rcd at 17260-63, ¶¶ 454-58.

[46] BellSouth App. at 5 (KPSC rejected petition of Southeast Telephone Inc. seeking an FCC waiver of the "no impairment" finding for enterprise customers).

demonstrates the correctness of the Commission's finding relating to switching used to serve enterprise customers.

Despite the no impairment finding concerning switching used to serve enterprise customers, the *Triennial Review Order* left a huge void concerning switching to serve mass market customers. While reaching inapposite conclusions regarding enterprise and mass market switching, the Commission failed to adopt rules clearly delineating between the two customer segments. The practical impact means that even today, the Commission's enterprise switching finding remains unfulfilled. More importantly, however, when the Commission appropriately accounts for the vast array of competitive alternatives, including intermodal, the record evidence shows no impairment exists for any switching whatsoever.

B. Competitive Supply Exists for Switching

Competitive supply for switching remains alive and well. CLECs operate a large embedded base of switches.[47] In BellSouth's serving territory alone, July 2004 LERG data[48] indicates there are more than 450 CLEC switches.[49]

Of the CLEC switches in BellSouth's serving territory, many of the switches currently serve mass-market customers.[50] Indeed, using the conservative assumption that a mass-market customer is a residential or small business customer with three or fewer DS0 lines, BellSouth

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[47] *UNE Fact Report 2004* at Section I, Table 1.

[48] The LERG is the industry source for routing of switched traffic, and it contains information concerning all competitive switches deployed nationwide. Notably, the LERG contains data *as reported by carriers themselves* and is updated on a monthly basis. Because the LERG contains self-reported data, there can be no legitimate CLEC protest lodged against using it to derive the numbers of CLEC circuit switches in BellSouth's serving territory.

[49] Tipton Affid., ¶ 4. *Also* n. 22 *supra.* Included with Ms. Tipton's Affidavit are exhibits that show the number of MSAs and Micropolitan Statistical Areas ("MCSAs") in BellSouth's serving territory that have circuit switches or switching points of interface ("POIs") using July 2004 LERG data and the filtering methodology described by Ms. Tipton.

[50] Tipton Affid., ¶ 12; *also* BellSouth App. at 6.

specifically identified 110 switches in its region serving mass-market customers.[51] There is ample record evidence that CLECs can and do economically use their switches to serve mass-market customers.[52] Indeed, AT&T has admitted that it "serves very small businesses from its switches today, which is a portion of the mass market."[53]

To the extent that CLEC circuit switches are not currently being used to serve mass-market customers, they could readily be.[54] Even AT&T concedes as much, acknowledging that "[t]here's no technological reason that prevents the use of [AT&T's six Florida local switches] as a UNE-L platform" and that "class 5 local switches . . . are capable of serving both enterprise and mass market customers."[55] Similarly, US LEC testified that, while it served business customers using DS1 or broadband facilities, it could also "market service to small business customers ... with its own switches."[56] US LEC also explained that it could "economically serve its targeted business customers in Georgia using its own switches, notwithstanding the costs of backhauling."[57] Likewise, Knology, a CLEC that predominantly serves the residential market, uses long-haul transport facilities throughout the state of Georgia, and can "economically serve

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[51] Tipton Affid., ¶12.

[52] *Id.* In the state impairment cases, BellSouth filed an economic model which indicated that in certain markets CLECs were impaired without access to unbundled circuit switching. However, BellSouth's model utilized the broad economic impairment standard that the D.C. Circuit questioned in *USTA II* and thus it did not consider the full extent of the intermodal alternatives that are ubiquitous throughout BellSouth's serving territory. Consequently, any suggestion that BellSouth has conceded impairment in certain areas without access to local circuit switching is false.

[53] BellSouth App. at 6.

[54] Tipton Affid., ¶ 22; Milner Affid., ¶ 10; BellSouth App. at 6.

[55] BellSouth App. at 6.

[56] BellSouth App. at 7.

[57] *Id.*

its customers in Georgia without access to unbundled switching from BellSouth, notwithstanding the costs of backhauling."[58]

CLECs have sought to avoid such facts by insisting that the number of mass-market customers served by CLEC switches is "de minimus." CLECs, however, did not and cannot dispute that CLEC switches are actually serving mass-market customers. That some CLECs have elected to utilize UNE-P rather than their own switches is unsurprising given the large profit margins that this synthetic form of competition entails. As the D.C. Circuit explained, however, the purpose of the 1996 Act is not "to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate." Although UNE-P CLECs invented a host of excuses in an attempt to explain away evidence of competitive switches,[59] it bears repeating that these carriers did not contest that such switches *actually serve* mass-market customers.[60] Indeed, one CLEC – FDN Communications – acknowledged the inherent fallacy in the enterprise/mass market switch distinction, testifying that "competitive switches out in the market ... serve enterprise customers [and] also do serve what you are calling mass market."[61]

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[58] BellSouth App. at 8.

[59] BellSouth App. at 9. *See* enumerated criteria of Sprint and CompSouth. That CLECs invented additional criteria in the state impairment proceedings in order to disqualify switching trigger candidates was particularly hypocritical given the CLECs acknowledgment before the D.C. Circuit that the self-provisioning switching test was "automatic." *See* Opening Brief of CLEC Petitioners, *USTA v. FCC,* (D.C Cir. Nos. 00-1012, 03-1310) at 36.

[60] *See* BellSouth App. at 6.

[61] BellSouth App. at 10. Remarkably, AT&T and MCI refused to concede FDN met the vacated self-provisioning trigger test, despite FDN's testimony that it was a trigger company. BellSouth App. at 23-24. BellSouth also identified as trigger companies in certain areas both ITC^DeltaCom, Inc. and Network Telephone Corp. On Sept. 8, 2004, these three companies announced definitive merger agreements, touting the benefits of this merger as providing "greater penetration in its southeastern market, an enhanced facilities-based platform to serve its expanding customer base, and a significantly improved competitive position." *See* http://www.fdncommunications.com; http://www.itcdeltacom.com; and http://www.networktelephone.net/NTCportal/Visitor.

Notably, FDN explained that "switching has been and still is readily available to any one willing to purchase a Class 5 type device."[62]

Today's switches are capable of serving multiple markets, entire states, indeed, the entire world.[63] CLECs have consistently touted the scope and reach of their switches and network architecture as efficient, and farther ranging than traditional ILEC switches.[64] That CLECs can readily use fewer switches and economically serve customers broadly dispersed throughout a large geographic area cannot be seriously disputed.

C. Intermodal Competition Exists For Switching

The array of intermodal competitive alternatives available today is phenomenal. While technological advances may have surpassed the traditional thinking of communications, the Commission has recognized that the 1996 Act "expresses no preference for the technology that carriers should use to compete with the incumbent LECs."[65] Indeed, intermodal services have grown exponentially, at growth rates that outstrip traditional wireline customers.[66] Residential and small business customers have ready access to intermodal alternatives that are equally available to medium and large businesses.

1. Voice-Over-Broadband Service

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[62] BellSouth App. at 10.

[63] BellSouth App. at 11.

[64] BellSouth App. at 12.

[65] *Triennial Review Order,* 18 FCC Rcd. at 17045, ¶ 97.

[66] June 2004 FCC Local Competition Report (*"Local Competition Report"),* available at www.fcc.gov/scb/stats. *Compare* 157.0 million mobile wireless telephone subscriptions *with* 29.6 million CLEC switched access lines; *also Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services,* WT Docket No. 04-111, FCC 04-216, ¶ 5 ("Ninth CMRS Report") (rel. Sept. 28, 2004) available at www.fcc.gov, (reporting 160.6 wireless subscribers as of December 2003).

The most promising new technologies are Internet protocol-based services provided using packet switches, most often over broadband transport. The service provided with these packet switches is commonly known as Voice over Internet Protocol, or more simply "VoIP." VoIP services are sold as a discrete offering running over broadband data connections, which are sold separately.[67] Cable companies, interexchange carriers ("IXCs"), CLECs, and a new breed of VoIP providers are all offering or are on the verge of offering such services. VoIP services may be economically provided to customers that already have a broadband connection as well as to those that have not yet added this feature. Moreover, industry analysts, competitive carriers, and equipment vendors now agree that VoIP provides quality and functionality comparable or superior to conventional circuit-switched service.[68]

The six major cable operators, which collectively reach 85% of U.S. households and serve 90% of all cable modem subscribers, have either begun or announced imminent plans to commercially deploy VoIP. Smaller cable companies are following the lead of the major operators. Analysts predict that within the next two years 80% or more of U.S. households will be able to obtain IP telephony services from their cable operator.[69]

VoIP services are not limited to cable companies – many traditional CLECs and IXCs have begun deploying VoIP services. Both AT&T and MCI are aggressively focusing on VoIP initiatives; AT&T projects one million VoIP customers by the end of 2005, while MCI claims that VoIP "has come into its own" and that "IP is the world's dominant protocol. It will continue

[67] *UNE Fact Report 2004* at Section II.

[68] *Id.* at Section II, A, 1 & 2.

[69] *UNE Fact Report 2004* at Section II, A, 2.

to evolve and prove its versatility, and so too will Voice over IP services."[70] Other CLECs are also aggressively launching VoIP service; for example Level 3 has announced an aggressive VoIP rollout.[71]

Additional competition in VoIP comes from new companies – such as Vonage – that do not offer traditional circuit-switched voice service, as well as providers that rely on the public Internet and do not own or operate network facilities – such as Skype. Vonage offers local numbers in more than 1,900 rate centers in 120 U.S. markets. Skype provides software that allows users to place free calls over the Internet. Pulver.com, Free World Dialup, Net2Phone and InPhonex also offer similar free-calling soft-phone service.[72]

In BellSouth's region, there are at least 200 packet/soft switches, which can be broadly utilized to provide customers VoIP services.[73] Packet switches, like other switches, have the technical capability of serving customers over a wide geographic area.[74] When considering the reach of these switches, it is clear that any given market -- whether an MSA, a LATA, or some smaller designation -- has ready access to VoIP service. For example, with respect to cable modem service specifically, BellSouth estimates that 83% of the households in the top 26 MSAs of its serving territory have such access.[75] BellSouth also has included maps reflecting the extensive cable footprint that exists throughout its serving territory. The cable modem

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[70] *Id.* at Section II, A, 1; *also* http://global.mci.com/us/info/email/digital_view/articles/voip.xml.

[71] *UNE Fact Report 2004* at Section II, A, 1.

[72] *Id.*

[73] Tipton Affid., ¶ 8.

[74] BellSouth App. at 11 (in describing Global NAPs' single packet switch located in the state of Florida, Mr. James Scheltema explained "any switch can serve any location in the entire world depending upon how you utilize transport.").

[75] Tipton Affid., ¶ 6.

percentages as well as the cable footprint maps visually depict the extent of the robust intermodal competition available to both mass market and enterprise customers alike.[76]

2. Circuit-Switched Cable Telephony

In addition to VoIP services, cable companies also offer circuit-switched cable telephony. Circuit-switched cable telephony is available to approximately 15% of all U.S. households, and more than 15% of households with access to cable telephony subscribe to this service.[77] Moreover cable telephony has grown – during the second half of 2003, cable telephony lines increased by 6%, to 3.2 million lines.[78] In BellSouth's region alone, Comcast currently offers circuit-switched phone service to tens of thousands of residential customers in Florida, Georgia, and Kentucky. In addition, Cox and Knology also actively provide circuit-switched cable telephony in selected areas of BellSouth's serving territory.[79]

3. Wireless

Wireless provides yet another competitive alternative to traditional wireline service. Ninety-seven percent of the total U.S. population lives in a county with access to three or more wireless providers.[80] The number of wireless subscribers has grown to approximately 160.6 million,[81] and 20 million new wireless subscribers are added annually.[82]

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[76] Tipton Affid., Exhs. PAT-2, PAT-3, and PAT-4.

[77] *Id.*

[78] *Local Competition Report* at 2; *also* June 18, 2004 News Release concerning *Local Competition Report;* ("cable telephony lines increased by 6% during the second half of 2003").

[79] Tipton Affid., ¶ 10; *and* BellSouth App. at 13-15.

[80] Ninth CMRS Report, ¶ 2.

[81] *Id.*, ¶ 5.

[82] *UNE Fact Report 2004* at Section II, B, 1.

Growing numbers of customers have embraced wireless technology to the point of abandoning traditional wireline service entirely. Estimates of the percentage of customers who currently subscribe only to wireless service range from six to eight percent.[83] Moreover, an even larger percentage of young consumers have abandoned traditional wireline service altogether.[84] Some analysts predict that approximately 13 percent of total access lines will be displaced by wireless service.[85]

Wireless service is prevalent in BellSouth's serving territory. Taking the data from this Commission's Ninth CMRS Report, BellSouth has created maps depicting the extent of the wireless service in the southeastern states. This data show that wireless services are available ubiquitously in BellSouth's region, and, like the cable modem data, underscore the numerous alternatives equally available to mass market and enterprise customers.[86]

In addition to traditional wireless service, wireless fidelity service, more commonly referred to as "Wi-Fi" is growing dramatically.[87] Wi-Fi networks allow multiple users to share bandwidth and send and receive data within a certain signal reach of a Wi-Fi base station. Wi-Fi access to the Internet has experienced explosive growth; Wi-Fi hotspots exist on a commercial and noncommercial basis. Wi-Fi access is available on a no-fee or a modest-fee basis, and industry analysts predict the continued growth of Wi-Fi access points as well as wireless Internet

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[83] *Id.*; *but see* FCC's August 2004 *Telephone Subscribership in the United States*, p. 2, n. 2 (estimating 6.0% of households have only wireless phones) available at http://www.fcc.gov/wcb/iatd/stats.html.

[84] *UNE Fact Report 2004* at Section II, B, 1.

[85] *Id.*

[86] Tipton Affid., Exh. PAT-8.

[87] FCC's Report, "Availability of Advanced Telecommunications Capability in the United States," Fourth Report to Congress (Sept. 9, 2004) ("Fourth Advanced Telecommunications Report"), at 17-18, *available at* www.fcc.gov.

providers. Wi-Fi provides another option for the last-mile provision of advanced services for residential use.[88]

D. CLECs Are Not Impaired Without Access to Unbundled Switching

Given the extensive deployment of competitive switches and the wide availability of other competitive alternatives, the Commission should find that CLECs are not impaired without unbundled access to circuit switching.

If history repeats itself, the CLECs will likely file comments seeking the continued availability of unbundled switching on a ubiquitous basis in the name of consumer welfare and competition. While the versions of this tired refrain vary, the gist of the song is that mass-market competition will suffer without access to the UNE-P. Attempting to give life to this terminally ill melody, the CLECs may even cite to their own press releases as alleged concrete evidence supporting this self-fulfilling, apocalyptic prophecy. The Commission should not fall prey to such antics.

In addition to considering existing and potential competitive alternatives, the "at a minimum" language of Section 251(d)(2) requires that the Commission assess impairment by analyzing: the effect of infrastructure investment when making unbundling decisions; the deterrent to investment posed by the regulatory environment; the balancing of the potential of

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[88] *Id.* In addition to the robust intermodal competition available with voice over broadband facilities, cable telephony, and wireless service, other options, such as satellite, and broadband over power lines ("BPL") present other competitive alternatives. The satellite industry continues to grow and provide critical services, which include voice, video, and data services. *See* "A Satellite Report," presented by David Abelson, FCC, Chief, International Bureau (Sept. 9, 2004), available at www.fcc.gov; *also* FCC's Report, *High Speed Services for Internet Access: Status as of December 31, 2003,* (rel. June 8, 2004), available at www.fcc.gov/wcb/stats (providers report using satellite technology in all 50 states). BPL systems use existing electrical power lines as a transmission medium to provide high-speed communications and have the potential to take advantage of the deployed infrastructure of the power grid to provide services to customers not yet served by either digital subscriber line ("DSL") service or by cable modem service. Initial trials of BPL are underway in Virginia, Pennsylvania, and Ohio. *Id.*

increased consumer costs in the short-term to stimulate future technological innovations; and the negative effect of unbundling on CLEC investment decisions.[89]

When considering such criteria, the only reasonable outcome is a finding of no impairment with respect to circuit switching. The intermodal competition created by cable, VoIP, and wireless services demonstrates clearly that consumers are benefiting from increased choice and reduced prices without the need for unbundled switching from BellSouth.[90] When factoring in the negative effect unbundling has on both ILEC and CLEC investment decisions,[91] it is clear that the "at a minimum" balancing favors extending the "no unbundling" decision that currently exists for enterprise switching to switching used to serve the mass market and erasing completely this artificial and unnecessary boundary.

VI. BELLSOUTH'S HOT CUT PROCESSES

In the *Triennial Review Order,* the Commission focused on alleged problems with the hot cut process in making its nationwide finding of impairment with respect to switching used to serve mass-market customers. The D.C. Circuit rejected the Commission's analysis and expressed "doubt" that the record evidence concerning hot cuts supported an impairment finding for mass-market switches.[92]

As explained more fully below, BellSouth's hot cut processes, including its batch hot cut process, allows for UNE loops to be provided at a high level of efficiency and quality and for large quantities of UNE-P arrangements to be converted to UNE loops in a short time frame.

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[89] *USTA II,* 359 F.3d at 581.

[90] *E.g., UNE Fact Report 2004* at Section I, A.

[91] *E.g.,* BellSouth App. at 12. (Global NAPs witness testified regulation was one complication preventing it from providing voice services to mass-market customers).

[92] *USTA II,* 359 F.3d at 569-70.

Accordingly, BellSouth's hot cut process cannot serve as a basis for a finding of impairment with respect to local circuit switching.[93]

A. BellSouth Individual Hot Cut Performance Continues to Be Excellent

This Commission has defined a hot cut as "a largely manual process requiring incumbent LEC technicians to manually disconnect the customer's loop which was hard wired to the incumbent LEC's switch and physically rewire it to the competitive LEC's switch."[94] The "cut is said to be 'hot' because telephone service on the specific customer's loop is interrupted for a brief period of time, usually fewer than five minutes, during the conversion process."[95]

This Commission reviewed BellSouth's individual hot cut process in the 271 proceedings and found that BellSouth provided CLECs with nondiscriminatory access to unbundled loops via its hot cut process.[96] BellSouth's hot cut performance data, which the Commission has previously reviewed and endorsed, establishes that BellSouth can effectively migrate loops from

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[93] The details of BellSouth's hot cut processes are set forth in the accompanying affidavit of Kenneth L. Ainsworth, W. Keith Milner, and Alphonso J. Varner (hereinafter "Ainsworth Affid.").

[94] *Triennial Review Order* 18 FCC Rcd at 17266 ¶ 465, n.1409.

[95] *See Application by Verizon New Jersey Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, *Memorandum Opinion and Order*, 17 FCC Rcd at 12275, ¶ 61 (2002) ("*New Jersey 271 Order*"); *see also Triennial Review Order*, 18 FCC Rcd at 17266, ¶ 465, n 1409 ("From the time the technician disconnects the subscriber's loop until the competitor reestablishes service, the subscriber is without service.").

[96] Ainsworth Affid., ¶ 17.

one carrier's switch to another carrier's switch.[97] Such data reflect that BellSouth's hot cut performance is consistently exemplary, and no CLEC has argued otherwise.[98]

Actual commercial usage, which the Commission has determined is the most probative evidence of the availability of network functionality,[99] further buttresses the Commission's 271 decision regarding BellSouth's ability to transfer effectively a loop from one carrier's switch to another carrier's switch. For example, BellSouth performed over 18,000 individual hot cuts for one CLEC in Florida from November 2003 to March 2004.[100] Indeed, for one day during this time period, BellSouth performed 360 hot cuts in a single office for one Florida CLEC with a due date met performance exceeding 98%.[101]

The commercial experience of FDN also establishes that BellSouth's hot cut process works. FDN, a CLEC providing service to mass market customers in Florida and Georgia using its own switch, testified that "[a]s a UNE-L based CLEC that performs numerous hot cuts for DS-0 loops daily and has more working DS-0 loops than any other single CLEC in the state, *FDN would be hard pressed to say that the hot cut process does not work well.*"[102]

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[97] *See Triennial Review Order*, 18 FCC Rcd at 17301, at ¶ 512 ("Specifically, we ask the states to determine whether incumbent LECs are providing nondiscriminatory access to unbundled loops. Evidence relating to this inquiry might include, for example, commercial performance data demonstrating the timeliness and accuracy with which the incumbent LEC performs loop provisioning and the existence of a penalty plans with respect to the applicable metrics.").

[98] Any argument that BellSouth's performance data is irrelevant to the Commission's impairment analysis is directly contradicted by paragraph 512 of the *Triennial Review Order*, wherein the Commission specifically referred to performance data to establish whether ILECs are providing nondiscriminatory access to loops.

[99] *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* CC Docket No. 99-295, *Memorandum Opinion and Order*, 15 FCC Rcd 3953, 3974, ¶ 53 (1999).

[100] BellSouth App. at 16; Ainsworth Affid., ¶ 67.

[101] Ainsworth Affid., ¶¶ 67-68; 11. *See also* BellSouth App. at 16.

[102] BellSouth App. at 20 (emphasis added).

B. BellSouth Has an Effective Batch Hot Cut Process

BellSouth has implemented a batch hot cut process for converting large quantities of UNE-P loops to UNE loops. In the *Triennial Review Order,* the Commission described certain criteria for an acceptable batch hot cut process that include: (1) the ability to migrate simultaneously two or more loops from one carrier's switch to another carrier's switch and specifically allow for the migration from UNE-P to UNE-L in a timely manner;[103]; and (2) a specified volume of loops, performance measurements associated with, and a rate for the batch hot cut process.[104] As established below, BellSouth's batch hot cut process satisfies all of these criteria.

1. BellSouth's Batch Hot Cut Process Is Efficient

BellSouth's batch hot cut process has three main components: preordering, batch ordering process, and batch provisioning. In the preordering phase, the CLEC submits a Notification Form (in spreadsheet format) to BellSouth identifying the lines it wishes to migrate. Second, a BellSouth project manager then reviews the spreadsheet, marshals and coordinates the necessary resources to migrate the lines, and assigns due dates to the cutovers.[105] Third, the CLEC submits to BellSouth a batch hot cut local service request ("LSR"), which allows CLECs to submit one order (i.e., an LSR) to request the conversion of up to 2,475 lines from UNE-P to UNE-L.[106] Fourth, BellSouth performs all rewiring prior to the due date for each hot cut and then

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[103] *See* 47 C.F.R. § 51.319(d)(ii).

[104] *Id.* at (d)(ii)(A)(3)(4).

[105] Ainsworth Affid., ¶ 7. BellSouth currently is developing a web-based scheduling tool that will allow CLECs to schedule the due dates for their orders on their own prior to submitting their bulk requests, which will shorten the batch process intervals. Ainsworth Affid., ¶ 24.

[106] Ainsworth Affid., ¶ 29.

coordinates and performs the hot cuts on the due date.[107] The actual provisioning work used to perform a hot cut in the batch process is the same process BellSouth uses in its individual hot cut process.[108]

With the batch process, BellSouth and the CLECs are able to obtain efficiencies in handling batch cuts that are not present in BellSouth's individual hot cut process. For instance, through the project manager, BellSouth is able to assign its work force to handle a particular workload for a specified time period.[109] Thus, rather than technicians handling one circuit at a time, they are equipped to process the entire batch in an efficient, managed sequence. AT&T has recognized that efficiencies can be gained through project management.[110] In addition, through the mechanized ordering process, the CLEC can use a single batch order to convert up to 2,475 telephone numbers.[111]

BellSouth's batch hot cut process includes batch provisioning. AT&T defined batch provisioning as working a set number of hot cuts within a time window,[112] while MCI defined batch provisioning as one in which there are multiple customers migrated on the same day.[113] BellSouth's batch process has both of these characteristics. When it performs batch hot cuts, BellSouth provisions groups (or batches) of loops in a single central office in a given time

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[107] Ainsworth Affid., ¶¶ 17; 20.

[108] Ainsworth Affid., ¶¶ 19-20.

[109] Ainsworth Affid., ¶ 10.

[110] BellSouth App. 19 (declaration of Ellyce Brenner stated "[t]here are numerous advantages to a project managed approach ..."; AT&T had already converted "UNE-P lines to its own facilities using the project-managed approach," which resulted in "a loss of dial tone ... less than 1 percent of the time ...").

[111] Ainsworth Affid., ¶ 29.

[112] BellSouth App. at 16.

[113] BellSouth App. at 17.

window. There is no other way to accomplish "batch" provisioning – as all parties agree, the cuts must be accomplished on a loop-by-loop basis.[114]

2. BellSouth's Batch Process is Dynamic and Scalable

BellSouth's batch hot cut process encompasses both DS0 EELs and DS0 loops via Integrated Digital Loop Carrier ("IDLC").[115] IDLC is a special version of Digital Loop Carrier ("DLC") that does not require a host terminal in the central office to disaggregate the multiplexed loops into individual transmission paths but instead terminates the digital transmission facilities directly into the central office switch.[116] In compliance with Commission requirements that BOCs "must provide competitors with access to unbundled loops regardless of whether the BOC uses integrated digital loop carrier ("IDLC") technology or similar remote concentration devices for the particular loops sought by the competitor," BellSouth provides CLECs with access to IDLC loops via eight different methods and includes loops served by IDLC equipment in the batch process.[117]

Moreover, BellSouth has added or is in the process of adding numerous features to its batch hot cut process to address CLEC concerns raised during the state *Triennial Review Order*

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[114] *See* BellSouth App. at 18. It is not possible to "batch" provision by one technician moving multiple loops simultaneously, and AT&T has conceded that batch provisioning does not require one technician pulling two jumpers off the frame at one time.

[115] Ainsworth Affid., ¶ 21.

[116] *See* Affidavit of Keith Milner, filed concurrently herewith ("Milner Affid.").

[117] *See* Memorandum Opinion and Order, Application by SBC Communications Inc. en. Al., Pursuant to Section 271 of Telecommunications Act of 1996 to Provide In-Region, InterLATA services in Texas, 15 FCC Rcd 18354 ¶ 248 (2000); *and* Milner Affid. filed concurrently herewith. With respect to the Commission's request for comment on whether and how it should clarify its rules regarding access to customers served by IDLC equipment in a manner that promotes facilities-based deployment, the Commission should simply refrain from creating any further rules in this area. As the attached affidavit of W. Keith Milner explains, BellSouth makes all of its loops, including loops provided via IDLC equipment, available to CLECs in a non-discriminatory manner. BellSouth provides access to IDLC loops in at least eight different ways, which have been considered and approved by this Commission and all of the state commissions in BellSouth's region in the context of its Section 271 applications.

cases. These additions include: after-hours hot cuts; weekend hot cuts; all hot cuts for a single account be performed on the same day; hot cut completion within a specified time window; hot cut timely restoral process; UNE-P to CLEC UNE-L hot cuts; CLEC UNE-L to CLEC UNE-L hot cuts; e-mail notification of hot cut completions; web-based scheduler; web-based notifier; shorter hot cut intervals; and hot cuts for DSO EELs.[118] These enhancements addressed virtually every single one of the CLECs' alleged criticisms of the batch hot cut process.[119]

In addition to being effective, BellSouth's batch hot cut process is scalable. BellSouth's batch hot cut process can meet the anticipated volume of hot cuts that will be required when unbundled switching is no longer available. To prove it can handle the volume, BellSouth ran a force model to forecast the additional load in the centers and network operations that would result if the Commission were to find no impairment. In this model, using Florida as an example, BellSouth used several conservative assumptions to prove that BellSouth's forces can handle the "worst-case" scenario of UNE-L volumes.[120]

Using these assumptions, which are detailed in the Ainsworth Affidavit, BellSouth determined that, beginning in August 2005, it would have to perform approximately 318,000 hot cuts a month or approximately 14,000 a day, region-wide. Based on these calculations, the BellSouth force model determined 687 additional central offices employees, 394 additional

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[118] Ainsworth Affid., ¶ 13.

[119] Throughout the state proceedings, no CLEC in BellSouth's region presented an alternative batch hot cut process for state commission consideration. While AT&T discussed its Electronic Loop Provisioning ("ELP") method, AT&T admitted that "there is no ILEC that has an old hot cut process that answers of [*sic*] our concerns at this time. Obviously, what we would like to see is an electronic method, which does not exist today." BellSouth App. at 18, 16. Similarly, MCI admitted that it had not proposed a batch hot cut process for any state commissions to adopt. BellSouth App. at 17. In addition to having no batch hot cut process of their own, AT&T and MCI have not found a batch hot cut process anywhere in the country that they can endorse. BellSouth App. at 18, 16.

[120] Ainsworth Affid., ¶ 71-95.

installation and maintenance employees, and 530 center employees would be needed to handle the increased hot cut volumes in Florida, BellSouth's largest state.[121] BellSouth can meet these increased work force levels as detailed in the Ainsworth Affidavit.

3. BellSouth's Batch Hot Cut Process Works

Because the CLECs have not used BellSouth's batch hot cut process, BellSouth hired PriceWaterhouseCoopers ("PWC") to verify that the process works. Specifically, after reviewing 724 hot cuts performed on multiple days and in multiple central offices and spending over 2500 hours performing the audit, PWC confirmed BellSouth's assertions that: (1) the batch hot cut process enables a CLEC to migrate multiple end-users from UNE-P service to UNE-L service; and (2) the batch hot cut process requires central office and field technicians to physically perform the individual hot cut process, which is the same region-wide.[122]

PWC's testing constitutes conclusive evidence that BellSouth's batch hot cut process works. PWC is the same audit company that performed regionality testing as part of BellSouth's 271 approval process, upon which the Commission relied in granting BellSouth 271 relief. Furthermore, PWC conducted its batch hot cut testing in accordance with the "attestation standards" established by the American Institute of Certified Public Accountants. "An attestation examination is one in which a practitioner is engaged to issue a written communication that expresses a conclusion about the reliability of a written assertion that is the responsibility of another party. An attestation examination is the highest level of assurance that can be provided on a written assertion under these standards."[123]

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[121] Ainsworth Affid. ¶ 81-82.

[122] Ainsworth Affid., generally, at ¶¶ 44-66.

[123] Ainsworth Affid. ¶ 46. AT&T generally supported testing of the batch process. AT&T witness Van de Water recommended that the batch process be subject to "both pre-

4. BellSouth's Batch Hot Cut Rate Is Reasonable

BellSouth offers its batch hot cut process at a reasonable rate. In recognition of the efficiencies gained through the batch process, for loops converted in the batch process, BellSouth charges ten percent (10%) off the applicable nonrecurring charge for individual hot cuts.[124] Importantly, the ten percent (10%) discount is off of the individual hot cut rates already established by the state commissions and which were either approved by this Commission as 271-compliant or which are lower than the rates approved by this Commission as 271-compliant.

D. CLEC Criticisms of BellSouth's Batch Process Are Speculative

In the state proceedings, the CLECs raised a myriad of arguments in an attempt to rebut the undeniable conclusion that BellSouth has a batch hot cut process that complies with the criteria set forth in the *Triennial Review Order*. As explained above, BellSouth has addressed most of these complaints through the enhancements to its process. To the extent the same performance arguments are raised in this proceeding, they are easily refuted.

In contrast to the overwhelming evidence presented by BellSouth that the batch hot cut process provides CLECs with the ability to timely and efficiently transfer volumes of lines from UNE-P to UNE-L, the CLECs have no empirical evidence to support their contrary claims. For instance, MCI admitted that despite filing extensive testimony alleging BellSouth's batch process would not work, it "had not ordered any hot cuts on a commercial basis for residential customers" in BellSouth's region.[125] MCI further admitted that it had no evidence to support its claims that: (1) "work is required on all of BellSouth's database used to configure and provide

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implementation and post-implementation testing" and urged that third-party testing be done to provide CLECs with assurance that they can move customers from UNE-P to UNE-L. BellSouth App. at 18, 28. The PWC audit operated exactly as Mr. Van de Water suggested.

[124] Ainsworth Affid., ¶ 10.

[125] BellSouth App. at 19, 29.

UNE-L to mass market customers, including LFACS, E-911, LIDB, CNAM, DA/DL and potentially others;" (2) MCI's customers have been put in the middle of "finger pointing exercises," involving BellSouth and MCI, with respect to the provisioning of UNE-L service; or (3) BellSouth's hot cut "process is not working."[126] When confronted with this glaring absence of proof, MCI conceded that it had no "first-hand" evidence of BellSouth's performance with respect to hot cuts and that its testimony on the issue was "speculative."[127]

AT&T's criticisms fare no better. AT&T's hot cut expert, Mr. Van de Water, criticized BellSouth's batch hot cut process, even though he had never worked in the BellSouth region and AT&T has no experience with BellSouth batch hot cut process because AT&T is not doing batch migrations.[128] Moreover, AT&T's alleged evidence of hot cut problems was approximately three years old.[129]

In considering a batch hot cut process in this proceeding, the Commission should evaluate the actual evidence before it. BellSouth has presented empirical data ranging from performance data and an independent, third party test, which establish that its batch process provides CLECs with a timely and efficient manner in which to migrate large volumes of lines from UNE-P to UNE-L. The Commission can and should extend its finding of no impairment to all switching, in full confidence that BellSouth's hot cut processes can readily convert UNE-P arrangements to UNE-L arrangements.

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[126] BellSouth App. at 29.

[127] BellSouth App. at 17.

[128] BellSouth App. at 16, 19, 21.

[129] BellSouth App. at 18. When BellSouth sought to obtain through discovery the factual evidence supporting its alleged hot cut problems that allegedly occurred years ago, AT&T responded that such documents "do not exist" or that "BellSouth specific data no longer exists." BellSouth App. at 30. As a result, AT&T has no credible evidence to support its hot cut claims.

VII. HIGH-CAPACITY TRANSPORT, LOOPS, AND DARK FIBER

A. CLECs Have Extensively Deployed High-Capacity Facilities

CLECs continue to deploy extensively high-capacity facilities, which the Commission defines as "DS1 [1.544 Mbps] and above."[130] In fact, this deployment has continued unabated since enactment of the 1996 Act. As of 1999, 47 of the top 50 MSAs had three or more competitors providing high-capacity transport.[131] As of year-end 2001, 49 of the top 50 MSAs had five or more competitors self-providing high-capacity transport, and competitors had deployed at least 184,000 miles of high-capacity facilities.[132] As of year-end 2003, competing providers had deployed at least one network in 140 of the top 150 MSAs, and each of the top 50 MSAs had an average of 19 CLEC fiber networks in which competitors self-provide high-capacity transport. These networks consist of 337,000 route miles of fiber optic cable.[133] Such extensive deployment is fatal to the notion that CLECs are impaired without access to high-capacity facilities on an unbundled basis.[134]

B. CLECs Make Extensive Use Of Special Access Services

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[130] *Triennial Review Order*, 18 FCC Rcd at 17012, ¶ 45; *see id.* at 17102, ¶ 197, n. 624.

[131] *See USTA I,* 290 F.3d at 422.

[132] *UNE Fact Report 2002* at Section III, B.

[133] *UNE Fact Report 2004* at Section I, Table 1.

[134] *See USTA I,* 290 F.3d at 422 (faulting Commission for failing to "explain[] why the record supports a finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis"). Although relatively few CLECs separately report the total number of local route miles they operate or the number of on-net buildings they serve, the available data reflect that CLECs continue to experience growth in both areas. *See UNE Fact Report 2004* at Section III, n. 8. (noting that only AT&T and Time Warner publicly reported their local route miles for each of the past two years, which increased by 2,500 and 1,075 route miles, respectively, while of the CLECs reporting their on-net buildings for the past two years, four reported increases ranging from 11 buildings (McLeodUSA) to an addition of 313 buildings (Time Warner Telecom)).

In addition to self-deployment of high-capacity facilities, CLECs routinely make use of ILEC tariffed special access services to fill out their networks.[135] The availability of special access services and their extensive use by CLECs is additional evidence that CLECs are not impaired without unbundled access to high capacity loops and transport. As the D.C. Circuit has made clear, "special access availability" is relevant to the Commission's impairment analysis, and the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired ...."[136]

In fact, CLECs use DS1 special access services more extensively than DS1 UNEs in competing against BellSouth. In BellSouth's region, there are 106,640 buildings served by CLECs using DS1 circuits, either purchased as special access services, UNEs, or both. Of these 106,640 buildings, 63% (67,312) are served either by special access services exclusively (51.8%) or by both special access services and UNE circuits (11.3%). Only approximately 37% of the buildings (39,328) are served by CLECs only through the use of UNE DS1 circuits.[137] Such extensive use of special access by CLECs belies any suggestion that they are impaired without access to high capacity facilities on an unbundled basis.

C. CLECs Should Be Prohibited From Converting Special Access To UNEs.

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[135] *See* Press Release, *Time Warner Telecom Applauds U.S. Eighth Circuit Court of Appeals Ruling Supporting Special Access Performance Reporting* (Aug. 25, 2004) (noting that Time Warner, a leader in "the deployment of innovative communications solutions to large, medium, and small businesses," "relies principally upon its own network facilities," but purchases special access services from ILECs "to reach customers not directly served by our fiber network") [http://www.twtelecom.com/Documents/Announcements/News/2004/]; *see* January 15, 2003 Ex Parte from US LEC Corp., CC Docket No. 01-338 (noting US LEC's use of ILEC special access facilities to augment its fiber network).

[136] *USTA II,* 359 F.3d at 577.

[137] Padgett Affid., ¶ 26.

Consistent with the D.C. Circuit's holding in *USTA II*, CLECs should be prohibited from converting special access services to unbundled network elements without any change to the underlying facility or the service to which it is put. By definition, a "conversion" can occur only if the requesting carrier already is using special access services to provide the services that it seeks to offer; otherwise there would be nothing to convert. And, if a carrier already is using special access services to provide the services that it seeks to offer, it cannot be said that it requires high-capacity loops or transport on an unbundled basis in order to offer those services.

Indeed, the only effect of a conversion would be to give that carrier access to the same facility that it is already using, but at the dramatically reduced TELRIC-based rates that apply once that facility is called a "UNE" instead of special access. But, as the Supreme Court made clear, the impairment standard is not satisfied simply because unbundled access would permit competitors to reduce their costs and earn higher profits.[138] Furthermore, as the D.C. Circuit noted:

> [T]he purpose of the [1996] Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition – preferably genuine, facilities-based competition. *Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling.*[139]

Thus, allowing special access conversions would run afoul of the 1996 Act and should be prohibited by the Commission.[140]

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[138] *Iowa Utilities Board,* 525 U.S. at 390.

[139] *USTA II,* 359 F.3d at 576.

[140] To be sure, the D.C. Circuit held that the Commission was "free to take into account such factors as administrability, risk of ILEC abuse, and the like" in assessing whether CLECs are impaired despite the availability of tariffed ILEC special access services. *USTA II*, 359 F.3d at 577. However, such factors cannot be used to rationalize a CLEC's converting special access to

D. CLECs Are Not Impaired Without Unbundled High-Capacity Transport and Dark Fiber In Central Offices With 5,000 Or More Business Lines.

In determining whether CLECs are impaired without access to unbundled high capacity interoffice transport and dark fiber, the Commission should find that no such impairment exists in central offices with 5,000 or more business lines. This finding is clearly supported by the analysis in the Affidavit of Shelley W. Padgett, which establishes a strong relationship between wire centers that serve 5,000 or more business lines and fiber-based collocation and average annual special access revenues. Central offices serving 5,000 or more business lines represent approximately 27% of the central offices in BellSouth's region.

Fiber-based collocation refers to a collocation arrangement where the CLEC has a non-BellSouth provided fiber optic entrance facility. The presence of fiber-based collocation provides a readily accessible indication of the level of competition in an area, as it clearly shows that alternative networks have been deployed and are accessible from a particular central office. It is important to note, however, that this measure underestimates the alternative facilities available due to the fact that not all alternative networks extend into many, or even any, ILEC central offices.[141]

A strong relationship exists between fiber-based collocation and central offices that serve 5,000 or more business lines. Whereas, only 3.1% of BellSouth's central offices with less than 5,000 business lines have one or more fiber-based collocation arrangements, almost 72% of

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UNEs because when a CLEC is already purchasing tariffed special access services to compete in the local exchange market, the rates for such services "don't impede competition" and there can be "no claim that ILECs would be able drastically to hike those rates." *Id.* at 576.

[141] Padgett Affid., ¶ 6; *UNE Fact Report 2004* at Section III, B (noting that "[t]he vast majority of competitive fiber networks reach more than one ILEC wire center, the CLEC's own local switch, the offices of one or more interexchange carriers, carrier hotels for data and Internet services, and numerous multi-tenant office and other private buildings") (citations omitted).

central offices with at least 5,000 business lines have one or more fiber-based collocation arrangements. Likewise, only 1% of central offices with less than 5,000 business lines have two or more fiber-based collocation arrangements, as compared with over 50% of central offices with at least 5,000 business lines. This same pattern – a significantly greater preponderance of fiber-based collocation in central offices with 5,000 or more business lines – continues when three, four, or more fiber-based collocation arrangements are considered.[142]

Similarly, almost 90% of BellSouth's central offices with one or more fiber-based collocation arrangements are those with 5,000 or more business lines. Central offices with 5,000 or more business lines also account for approximately 96% of central offices with two or more fiber-based collocation arrangements and nearly 100% of those with three or more fiber-based collocation arrangements. That competitors have deployed fiber optic facilities primarily in central offices with at least 5,000 business lines is compelling evidence that such central offices are attractive markets capable of supporting competitive transport facilities.[143]

Of course, fiber-based collocation arrangements are only one indication of where competitive fiber has already been deployed; but they say nothing about where competition by CLEC-provided high capacity transport is possible. Consequently, BellSouth also analyzed the average annual special access revenues that it receives in each central office. The volume of special access services (as expressed by average annual revenue) reflects the extent to which a market exists for "premium" telecommunications services and thus provides an indication where competitive fiber optic facilities could readily be deployed.[144]

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[142] Padgett Affid., ¶ 8 (Table 1).

[143] Padgett Affid., ¶ 9 (Table2).

[144] Padgett Affid. ¶ 7.

A strong relationship also exists between BellSouth's annual special access revenues and central offices that serve 5,000 or more business lines. Of all BellSouth's central offices with at least 5,000 business lines:

- ✓ more than 97% have at least $200,000 in special access services purchased annually from BellSouth;
- ✓ almost 90% have more than $400,000 in special access services purchased annually from BellSouth; and
- ✓ more than 50% have more than $1,000,000 in special access services purchased annually from BellSouth.[145]

A dramatic distinction exists at every revenue level in the distribution between central offices with less than 5,000 business lines and those that have at least 5,000 business lines. Seventy percent of the central offices with more than $200,000 in special access services purchased annually from BellSouth also serve 5,000 or more business lines. Central offices with 5,000 or more business lines also account for approximately 88% of those central offices with more than $400,000 in annual special access spend and more than 94% of those with more than $600,000 in annual special access spend. In short, almost all of the "highest value" central offices (as measured by special access revenues) have at least 5,000 business lines, and the demand for "premium" telecommunications services (again, as measured by special access revenues) is greatest in central offices with at least 5,000 business lines.[146]

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[145] Padgett Affid., ¶ 10 (Table 3).

[146] Padgett Affid., ¶ 11 (Table 4). Of course, using BellSouth special access revenue as a proxy for markets where competitive supply would be economically possible is conservative because it does not account for all demand for telecommunications services. In particular, the demand for switched access services, services provided via alternative facilities, or services not offered by BellSouth are not reflected. *Id.*

By correlating the number of business lines, fiber based collocation arrangements, and special access revenues, the Commission can assess not only those geographic areas where CLECs are currently deploying competitive fiber but also where they are capable of doing so without access to unbundled network elements, as required by the D.C. Circuit.[147] Eliminating the unbundling of high capacity transport in central offices with 5,000 or more business lines is consistent with the evidence that CLECs are serving customers in those central offices with their own fiber networks or readily could be.[148]

The Commission should consider impairment for interoffice transport on a wire center basis without regard to the end point of the particular fiber route. Otherwise, the Commission would be left to define each individual interoffice route as a market, which is both an inefficient and unrealistic method of examining competitive deployment and which would be inconsistent with the D.C. Circuit's directives.[149]

First, the Commission must consider the impairment CLECs face, if any, when entering the market in a broader sense. While there may be some question as to the proper geographic market that should be examined, it is clear that carriers do not decide to enter a market consisting

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[147] *See USTA II,* 359 F.3d at 571 (noting that the issue for impairment purposes is "whether a market is suitable for competitive supply," which requires an inquiry into whether "competition is possible," regardless whether competitors are currently competing in a given market).

[148] Exhibit SWP-1 contains a list of those central offices in BellSouth's region with 5,000 or more business lines where the Commission should grant relief from any requirement to provide high capacity interoffice transport on an unbundled basis. Exhibit SWP-1 also contains corresponding data for number of business lines, number of fiber-based collocation arrangements, and average annual special access revenues for each of these central offices. Padgett Affid. ¶13.

[149] *See USTA I,* 290 F.3d at 422 (directing the Commission to infer, based on the evidence of competitive deployment, the characteristics of markets where, even if CLECs have not yet deployed their own facilities, they could).

of a single route. Carriers enter a customer market and design their networks to serve the geographic area that encompasses those customer locations.[150]

Second, examining competitive deployment on a route-by-route basis would ignore that CLECs are not constrained by the traditional tandem switch-end office switch design of the incumbent's network. Instead, CLECs design their networks so that they can reach the offices of interexchange carriers, carrier hotels, and numerous multi-tenant and other private buildings from a single central office. If CLECs can economically self-provide transport from a single central office, the end point of the fiber optic route is irrelevant in assessing impairment.[151]

Third, a route-by-route impairment test for interoffice transport also will encourage CLECs to engage in gaming in order to minimize their transport costs. For example, assume the Commission finds that there is no impairment on the route between Central Office 1 and Central Office 2 (CO1-CO2) so UNE interoffice transport is not available along that route. Further assume the Commission requires that the ILEC provide unbundled access to transport between Central Office 1 and Central Office 3 (CO1- CO3) and between CO2 and CO3 (CO2-CO3). In this instance, in the absence of market-distorting pricing regulations, carriers would route traffic directly from CO1 to CO2. However, in order to take advantage of TELRIC transport rates, carriers would likely route their traffic from CO1 to CO3 and then from CO3 to CO2, for no reason other than to game the system.[152]

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[150] Padgett Affid., ¶ 15.

[151] Padgett Affid., ¶ 16. Because of the design of their networks, CLECs do not have to build facilities to every existing central office. Rather, they can aggregate their traffic at particular central offices and can purchase special access from the ILEC or a third-party provider in order to connect facilities where necessary.

[152] Padgett Affid., ¶ 17 (Exhibit SWP-2).

Given the realities of market entry decisions as well as the gaming opportunities afforded by a route-by-route impairment ruling, the Commission should consider the characteristics of those wire centers where competitive fiber routes have been deployed and infer that transport can be economically provided from such wire centers without regard to the end point of any particular fiber route. Based upon this analysis, the Commission should find that CLECs are not impaired without unbundled interoffice transport from any central office serving 5,000 or more business lines.

E. CLECs Are Not Impaired Without Unbundled High-Capacity Loops and Dark Fiber In Central Offices With 5,000 Or More Business Lines.

In determining whether CLECs are impaired without access to unbundled high capacity loops and dark fiber, the Commission should find that no such impairment exists for those facilities served from central offices with 5,000 or more business lines. Such a finding is consistent with the analysis in Ms. Padgett's Affidavit, which establishes a strong correlation between wire centers that serve 5,000 or more business lines, fiber-based collocation, existing CLEC-lit buildings, and CLEC use of special access services to serve end users.

In assessing impairment, evidence of actual deployment of CLEC-provided high capacity loops would be extremely probative. However, CLECs have been less than forthcoming in providing such evidence. CLECs publicly report very little information about their fiber networks;[153] indeed during the state proceedings initiated in response to the *Triennial Review Order*, CLECs disclosed very little about the locations of their high capacity loops, even though they obviously have this information.[154]

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[153] *UNE Fact Report 2004* at Section III, A.

[154] Padgett Affid., ¶ 20.

However, there is little doubt that CLECs are deploying their own fiber facilities, including high capacity loops. For example, both AT&T and MCI have trumpeted the number of high-capacity circuits, including DS-1 equivalent service, provided exclusively through their own networks. Indeed, according to one industry analyst's estimates, AT&T currently earns at least 25 percent of its high-capacity revenues entirely over its own network.[155]

Although CLECs have been reluctant to identify the location of their high-capacity loops, competitive information is available from the GeoResults GeoLIT™ Plus Report ("GeoLIT™ Report"), which is based on data self-reported by carriers to Telcordia. In this context, a building is "lit" if it is served in part or in whole by fiber optic cable facilities with associated electronic equipment in place. Based on the data in the GeoLIT™ Report, BellSouth determined that, although only a little more than one-quarter of BellSouth's central offices have at least 5,000 business lines, 86% of the central offices with CLEC lit buildings are in central offices that have at least 5,000 business lines. CLECs have deployed fiber optic facilities to serve end users and these facilities are disproportionately concentrated in central offices with a business line density of at least 5,000.[156]

There also is little doubt that CLECs are using special access to provide high-capacity services, including DS-1 equivalent service, to their end-user customers.[157] In fact, in central

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[155] *UNE Fact Report 2004* at Section III, A.

[156] Padgett Affid., ¶ 24 (Table 5). This data understate the extent of competitive high-capacity loop deployment, if for no other reason than the GeoLIT™ Report only contains self-reported data and does not reflect buildings served by carriers who have elected not to report such information to Telcordia. The data also is conservative in that BellSouth removed competitively lit buildings from the GeoLIT™ Report in which BellSouth appeared to be the underlying wholesale provider of the fiber optic facilities. *Id.*, ¶ 23.

[157] Padgett Affid., ¶ 21.

offices with 5,000 or more business lines, CLECs rely more upon special access than UNEs.[158] That CLECs are capable of, and indeed are, using BellSouth's special access services as a viable means of entering the market indicates that a CLEC is not impaired without access to the same underlying facilities purchased on an unbundled basis.[159]

In addition to the ability of CLECs to use special access to compete, a strong relationship exists between such use and the number of business lines in central offices. Approximately 92% of BellSouth central offices with less than 5,000 business lines have 50 or fewer buildings in which CLECs are using DS1 special access circuits to serve end users. By contrast, 95.6% of the central offices with at least 5,000 business lines have more than 51 buildings in which CLECs are using DS1 special access circuits to serve end users.[160]

Furthermore, central offices that have 20 or fewer buildings served by CLECs using special access to serve end users and central offices with 21 to 50 buildings served by CLECs using special access are considerably more likely to be those central offices with fewer than 5,000 business lines (100% and 90.7%, respectively). By contrast, the vast majority (82.5%) of central offices with 51 or more buildings in which CLECs are using special access to serve end users are central offices with 5,000 or more business lines.[161]

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[158] Padgett Affid., ¶ 26-28.

[159] *See USTA II,* 359 F.3d at 577 (noting that "special access availability" is relevant to the Commission's impairment analysis and requiring the Commission to "consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired").

[160] Padgett Affid., ¶ 27.

[161] Padgett Affid., ¶ 28 (Table 7). Not surprisingly, central offices with fewer than 5,000 business lines account for considerably lower levels of special access revenues. For example, only 12.1% of the central offices with fewer than 5,000 business lines had special access revenues from CLECs serving end users that were in excess of $200,000 annually. By contrast, more than 92% of the central offices with at least 5,000 business lines had special access revenues from CLECs serving end users that exceeded $200,000 annually. Furthermore, in excess of 74% of the central offices in which there is more than $200,000 generated annually by CLECs using special access

The evidence establishes a strong correlation between wire centers that serve 5,000 or more business lines, fiber-based collocation, CLEC-lit buildings, and special access services.[162] Thus, the Commission should conclude that wire centers with 5,000 or more business lines can economically support competitive high capacity loops and dark fiber and should find that CLECs are not impaired without access to unbundled high-capacity facilities from such central offices.[163]

Some CLECs will likely argue that they are impaired without access to DS-1 unbundled loops, pointing to the relatively few DS-1 loops that CLECs have self-provided. However, this argument is misleading and irrelevant. First, it is impossible to know with any precision how many DS-1 loops CLECs have self-provided, since CLECs do not publicly report such information and have generally failed to disclose any detailed data about their fiber optic networks. Second, and more to the point, because CLECs have fiber optic networks that serve or pass directly beneath or alongside tens of thousands of buildings, CLECs can readily supply high-capacity loops to any customer in these buildings, at any capacity from DS-1 on up, regardless of whether they have chosen to do so.

CLECs typically deploy fiber optic facilities that can operate at a range of capacities determined by the electronics attached to them, and a carrier with channelized fiber optic

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to serve end users are central offices with 5,000 or more business lines. Central offices with 5,000 or more business lines also account for more than 93% of those in which at least $400,000 in revenue is generated annually by CLECs using special access to serve end users. *Id.* ¶¶ 29-30 (Tables 8 & 9).

[162] Padgett Affid., ¶ 31.

[163] Exhibit SWP-3 contains a list of those central offices in BellSouth's region with 5,000 or more business lines where the Commission should grant relief from any requirement to provide high capacity loops on an unbundled basis. Exhibit SWP-3 also contains corresponding data for number of business lines, number of fiber-based collocation arrangements, annual end user special access revenues, number of end user special access circuits, and building level end user telecommunications spending for each of these central offices. Padgett Affid., ¶ 31.

facilities is operationally ready to provide DS1, DS3 or above loop and transport facilities. When deploying fiber optic cable it makes sense for a CLEC to deploy high-capacity, "OCn" facilities so that there always will be enough bandwidth to serve a particular geographic area. The carrier can then attach electronics to subdivide (or "channelize") the available capacity, activating the amount of capacity and number of channels needed along the loop or route. The electronics used to do this channelization of OCn facilities into DS1 or DS3 facilities are relatively inexpensive, are widely available, and can be quickly installed whenever the carrier has demand for DS1 or DS3 facilities.[164]

Furthermore, for network engineering reasons and based on the cost structure of fiber optic cables, it is common to place additional spare fiber strands in anticipation of future needs. Since the cost of deploying a fiber optic cable is mostly fixed (e.g., digging up the streets, attaching cable to poles, and deploying the fiber) and only slightly correlated with the number of fiber strands in the cable, carriers almost always choose to deploy a considerably larger number of strands than what they need for their immediate transmission needs. In fact, although generally four (4) fibers are enough to support OCn circuits that can provide enough capacity for any route, CLECs typically deploy 144 fiber strands or more when extending a cable to large commercial buildings or ILEC wire centers. Sizing cables in this manner is how BellSouth is able to provide dark fiber to CLECs on request – when carriers construct networks, no carrier simply places facilities only for actual demand. Instead, demand for future needs is taken into account such that an efficient carrier does not later incur additional construction costs.[165]

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[164] Milner Affid., ¶ 24.

[165] Milner Affid., ¶ 27.

Because any CLEC with a fiber network can technologically and economically provide high capacity services to any customer at any capacity from DS-1 on up, it is inappropriate to examine impairment on a bandwidth-specific basis. In other words, the Commission cannot and should not determine that a CLEC is impaired without unbundled access to DS-1 loops by ignoring the other high capacity facilities that a CLEC can provide using its fiber network.

BellSouth has proposed an impairment test for high capacity loops and transport that complies fully with the 1996 Act and the D.C. Circuit's directives. First, BellSouth's proposal to make impairment determinations for high capacity loops and transport at the wire center level is consistent with the D.C. Circuit's admonition in *USTA I* that the Commission should use "nuanced market definitions" in analyzing impairment. Furthermore, BellSouth's proposed test to examine impairment at the central office level by focusing on business access lines is consistent with competitive entry.

Second, BellSouth's impairment test takes into account not only those geographic areas where CLECs are currently deploying competitive fiber but also where they are capable of doing so without access to unbundled network elements. In particular, BellSouth's impairment test analyzes the extent to which CLECs can and do serve customers via special access, as required by the D.C. Circuit.

Finally, BellSouth's impairment test is straightforward, easily administered, and provides a "bright line" for determining where high-capacity loops and transport must be unbundled. Furthermore, as required by the D.C. Circuit, the test will allow the Commission to make reasonable impairment findings without further fact-finding proceedings or involvement of the states.

Accordingly, the Commission should adopt BellSouth's proposed test and find that CLECs are not impaired without unbundled access to high capacity loops, transport, and dark fiber in central offices with 5,000 or more business lines.

VIII. ENTRANCE FACILITIES AND ENHANCED EXTENDED LOOPS

A. Dedicated Transport Should Not Include Entrance Facilities

Entrance facilities, which connect ILEC and CLEC networks, were included under the rubric of dedicated transport in both the *Local Competition Order* and the *UNE Remand Order*.[166] On review, however, the Supreme Court and the D.C. Circuit found the dedicated transport definition overbroad.[167] Consequently, the Commission was legally obligated to address its dedicated transport UNE definition to cure its overbreadth. The Commission did so in the *Triennial Review Order*, by properly excluding entrance facilities from the definition of dedicated transport. The Commission found that the economics of dedicated facilities used for backhaul between networks are sufficiently different from transport within an incumbent LEC's network." Relying on these economic distinctions and other factors this Commission opted for a more limited dedicated transport definition.

On appeal, CLECs argued that the exclusion of entrance facilities from the definition of dedicated transport in the *Triennial Review Order* was inconsistent with the statutory definition of "network element."[168] The D.C. Circuit remanded the issue for further consideration. In

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[166] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98 & 95-185, *First Report and Order*, 11 FCC Rcd 15499, 15714-22, ¶¶ 428- 51 (1996) ("*Local Competition Order*"); also *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking,* 15 FCC Rcd 3696, 3842-43, ¶ 322-23 (1999) ("*UNE Remand Order*").

[167] *Iowa Utils. Bd.*, 525 U.S. at 391; *USTA I*, 290 F.3d at 428.

[168] *USTA II*, 359 F.3d at 561.

addressing entrance facilities here, the Commission should clarify that it did not rely upon the definition of "network elements" in 47 U.S.C. § 153(29); instead entrance facilities are properly excluded from the definition of "dedicated transport." Consequently, neither an impairment analysis nor any unbundling is required.

1. The Commission Did Not Rely upon Section 153(29) in Excluding Entrance Facilities from the Definition of Dedicated Transport

Despite CLEC arguments on appeal, a fair reading of the *Triennial Review Order* demonstrates that the Commission did not address entrance facilities under Section 153(29).[169] Rather, the Commission simply determined that entrance facilities are not properly a part of the Section 251 dedicated transport UNE, which had been vacated twice as overbroad. Just as the Commission initially identified UNEs while reserving its discretion to add or exclude UNEs in the future, the Commission has similar authority to identify or exclude non-required elements from the overall dedicated transport UNE definition, particularly in light of the decisions of the Supreme Court and the D.C. Circuit.

In the *Triennial Review Order,* the Commission explained that competing carriers have control over where to locate their facilities to minimize the costs of self-deployment. CLECs also have access to competitive supply from non-ILEC, third-party alternative sources. Likewise, entrance facilities often represent "the point of greatest aggregation of traffic in a

[169] A fair reading of the *Triennial Review Order* demonstrates the Commission's use of the term "facility" is consistent with the use of that term in Section 153(29). By citing to Section 153(29) in the *Triennial Review Order* at n. 1118 the Commission simply denoted the source of the phrase "features, functions and capabilities" contained in ¶ 366. The Commission's language thus stands for the unremarkable proposition that the new definition of dedicated transport *comports* with Section 152(29), and not that entrance facilities do not comport with the same.

competing carrier's network." Consequently, excluding unbundled access to entrance facilities encourages self-deployment.[170]

The Commission's decision concerning entrance facilities makes sense given the entire universe of possible Section 153(29) "network elements" encompassed in a literal definition. To take the CLECs' arguments to their logical conclusion, the Commission would have to consider all facilities and all services as potential UNEs since they are capable of being used in the provision of a telecommunications service. The reality, however, is that all such facilities and services are not and cannot be UNEs; indeed, Section 153(29) network elements could just as easily belong to non-ILEC facility-based telecommunications service providers that not obligated to provide access to them pursuant to Section 251.[171] The Commission thus correctly observed that, "just because a facility is capable of being unbundled [by an ILEC] does not mean that that it is appropriately considered to be a network element for purposes of 251." [172] Stated simply, just because a facility may constitute a "network element" under 153(29) does not mean that it is automatically, or even appropriately, considered a network element for unbundling purposes under Section 251.

More importantly, by time the *Triennial Review Order* was released, the Commission had not yet adopted lawful impairment rules relating to the dedicated transport UNE. As such, the Commission's decision to not require mandatory unbundling of a portion of an ILEC related facility at TELRIC rates under Section 251, regardless of an entrance facility's generic status as a "network element" under Section 153(29), is appropriate. If the Commission so clarifies its

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[170] *Triennial Review Order*, 18 FCC Rcd at 17205, ¶ 367.

[171] *But see* 47 U.S.C. §251(h)(2)(allowing Commission under certain circumstances to provide for the treatment of LECs, or classes or categories of LECs, as ILECs for the purposes of 251).

[172] *Triennial Review Order*, 18 FCC Rcd at 17204, ¶ 366 (emphasis added).

decision it may well obviate the need to undertake any separate impairment analysis for entrance facilities.[173]

2. In the Alternative, Entrance Facilities Should Not Be Treated As UNEs

The D.C. Circuit acknowledged that entrance facilities were unsuited for compelled unbundling. It did so by openly questioning why ILECs, and not CLECs, tend to construct entrance facilities. In relevant part, the D.C. Circuit noted that entrance facilities exist exclusively for a CLEC's convenience. It also observed that it is anomalous that CLECs do not provide entrance facilities when they could do so, presumably, at costs associated with "the most efficient telecommunications technology currently available, . . . i.e., the TELRIC standard."[174]

Because both CLECs and ILECs can provision an entrance facility, neither has any first-mover or sunk-cost advantage. Rather, entrance facility links are simply not part of the ILEC's legacy network.[175] Indeed, when a requesting carrier orders a new entrance facility from BellSouth, BellSouth designs, engineers, constructs and deploys the facility to order; subsequent to construction the facility is dedicated to the use of the ordering carrier and is not used by BellSouth to serve its own end users.[176] Significantly, these links are "the most competitive type of transport," and competitive deployment of these links is "pervasive."[177]

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[173] Because its two earlier definitions had been vacated by the Supreme Court and the D.C. Circuit, respectively, the dedicated transport definition adopted in the *Triennial Review Order* never modified any lawful definition of dedicated transport. Starting from a blank slate, the vacated portion of the most recent definition is not lawful given the general lack of impairment for high capacity transport and loops. However, the remanded portion of the dedicated transport definition that excludes entrance facilities is fully supported in the record.

[174] *USTA II,* 359 F.3d at 586.

[175] *See Triennial Review Order*, 18 FCC Rcd at 17203-04, ¶ 366.

[176] Padgett Affid., ¶ 37.

[177] *UNE Fact Report 2004* at Section III, E, 1, a.

In addition, it is easy to determine where competitive alternatives are already available: in every wire center where one or more competing carriers has collocated fiber-based transmission equipment.[178] The presence of such equipment establishes one CLEC's network-wide link to that wire center because competing carriers (like ILECs) deploy continuous, self-connected networks, not discrete fragments of network here and there.[179] CLECs, of course, have the unfettered opportunity to interconnect their networks with each other, so that all of them can gain access to that same wire center over the same competitive entrance facility.[180]

That entrance facilities are the most competitive type of transport link is borne out by reality – competing carriers have been migrating from entrance facilities obtained from BellSouth to facilities that are either self-deployed or obtained from another source. In the past year alone, 10-20% of entrance facilities previously provided by BellSouth were replaced with facilities obtained by non-BellSouth provided sources.[181] Further, when competing carriers do request entrance facilities from BellSouth, they have purchased these facilities as special access circuits: fully 98.66% of the entrance facilities provisioned by BellSouth were purchased as special access facilities, while less than 1.5% were purchased as UNEs.[182] As the *USTA II* court observed, the presence of robust competition in a market where CLECs use critical ILEC

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[178] *Id. cf. Access Charge Reform, et al.*, CC Docket No. 96-262, *et al., Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd at 14221, ¶ 81 (1999) ("*Pricing Flexibility Order*") (holding that fiber-based collocation provides strong indication of competitive entrance facility deployment).

[179] *UNE Fact Report 2004* at Section III, E, 1, b.

[180] *UNE Fact Report 2004* at Section III, E, 1, a.

[181] Padgett Affid., ¶ 39.

[182] *Id.*

facilities by purchasing special access at wholesale rates, i.e., under § 251(c)(4), precludes a finding that the CLECs are "impaired" by lack of access to the element under § 251(c)(3).[183]

Thus, the Commission was well advised to remove entrance facilities from its definition of dedicated transport for Section 251 purposes. On remand, it has ample foundation to declare, broadly, that requesting carriers are not impaired without access to these facilities, given that the link lies outside the ILEC network, is custom built for requesting competitors, is dedicated to the use of the requesting carrier and is not used to serve ILEC end users, and is pervasively deployed nationwide on a competitive basis, especially in BellSouth's serving territories.

3. Competitive Providers Are Not Impaired Without Unbundled Entrance Facilities

Even assuming that an entrance facility constituted a UNE (which is not the case), competitive providers are not impaired without access to such facilities on an unbundled basis. This Commission has long distinguished the special access market from the market for local exchange service, and concluded that special access facilities were suitable for competitive supply. Over a decade ago, in 1992, the Commission acknowledged the extensive build-out of alternative fiber optic networks and concluded that DS1 and DS3 special access service were subject to competitive supply.[184] The Commission observed then that this competitive pressure was growing rapidly and would continue to do so.[185]

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[183] *USTA I*, 359 F.3d at 59

[184] *See Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs*, CC Docket Nos. 91-141 and 92-222, *Report and Order and Notice of Proposed Rulemaking,* 7 FCC Rcd. at 7369 (1992) ("*Special Access Order*").

[185] *Id.* at 7453, ¶ 177 (recognizing that in 1992, "competition is already developing relatively rapidly in the urban markets and will only accelerate with the implementation of expanded interconnection").

Indeed, the Commission' *Pricing Flexibility Order* -- which like the Supplemental Order Clarification was affirmed by the D. C. Circuit,[186] – was expressly based on the fact that there is special access competition in many MSAs throughout the country, and thus that the market, not regulators, should set prices.[187] And as a result of the Commission's decisions, a competitive market for special access continues to flourish today.

Thus, as the Commission properly recognized five years ago competition in the special access market is "mature."[188] Indeed, it was the existence of extensive facilities-based competition upon which the Commission relied upon in large part to justify the *Supplemental Order Clarification*,[189] which was in turn upheld by the *CompTel*[190] court. The Commission was clear that it wanted to limit the use of UNEs as a substitute for special access to avoid "undercut[ting] the market position of many facilities-based competitive access providers."[191] Extensive facilities-based competition continues to exist in this market. The facts establishing the highly competitive nature of special access markets have been discussed in detail in prior filings (including BellSouth, SBC, and Verizon's recent ex partes)[192] and are consistent with the

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[186] *See WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[187] *See Pricing Flexibility Order*, 14 FCC Rcd at 14233, ¶ 21 (1999).

[188] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, *Supplemental Order Clarification,* 15 FCC Rcd at 9587, 9597, ¶ 18 (2000).

[189] *Id.*

[190] *Competitive Telecom. Ass'n v. FCC,* 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*").

[191] *Id.* at 16.

[192] Letter from Joseph Mulieri, Vice President, Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, RM No. 10593, and accompanying materials (filed July 13, 2004) enclosing "Competing Providers are Successfully Providing High-Capacity Services to Customers without Using Unbundled Elements." Letter from Christopher M. Heimann, General Attorney, SBC Telecommunications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 & 98-147 (filed Aug. 18, 2004). Letter from Glenn T. Reynolds, Vice President, Federal Regulatory, Bellsouth D.C. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 04-313, CC Docket Nos. 01-338, 96-98 & 98-147 (filed Oct. 1, 2004).

UNE Fact Report 2004.[193] Competitive access providers, as an actual, alternative source of special access, are simply not impaired and are entitled to purchase ILEC entrance facilities as UNEs.

B. The Commission Should Strictly Limit the Scope of EEL unbundling

An "enhanced extended link" (EEL) is composed of two component network elements, high-capacity loops and high capacity transport.[194] Because, as shown above, there is no impairment with respect to the component loop and transport elements,[195] EELs should no longer be subject to mandatory unbundling.

Moreover, EELs are especially susceptible gaming and arbitrage. Under the *Triennial Review Order*, EELs obtained at TELRIC rates ostensibly to provide local wireline service could be used to provide service in markets where competition thrives and where there is no impairment, such as the wireless, and long distance markets.[196] As the D.C. Circuit observed in *USTA II*, "IXC providers have traditionally purchased these services from ILECs for long distance purposes as a special access service, i.e., under the ILEC's tariff rather than at TELRIC rates."[197]

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[193] *UNE Fact Report 2004* at Section III, *passim*. Given the fact that competitors already have captured such a large share of the special access market – and have done so with strictly limited access to UNEs to provide special access – there can be no serious dispute that special access service are not "unsuitable for competitive supply" so as to justify unbundling. *USTA I*, 290 F. 3d at 427. Simply put, the best evidence that CLECs can provide this service over their own facilities or those leased from others is surely the fact that they are doing so in geographic markets throughout the country.

[194] *USTA II*, 359 F.3d at 590 (citing *Supplemental Order Clarification*, 15 FCC Rcd at 9593, ¶ 10 n.36). ("Enhanced extended links ("EELs") are high-capacity loop/transport combinations that run directly between and end user (usually a large business customer) and an IXC/CLEC office.").

[195] *Supra Section* VII.

[196] *Id.* (EELS can also be used to "originate and terminate long distance calls.").

[197] *Id.*

The Commission must therefore ensure that high capacity loop and transport UNE combinations are confined to markets where impairment exists. Indeed, the Commission has attempted to prevent regulatory gaming of these specific UNE combinations. In two subsequent orders clarifying its *1999 UNE Remand Order*, the Commission acknowledged that the Supreme Court had found the Commission's initial impairment analysis "insufficiently rigorous," and concluded that an impairment finding in one market did not mandate the UNE's use in separate markets.[198] The Commission reasoned that, unless it found distinct markets to be economically and technologically interrelated, "it is unlikely that Congress intended to compel us, once we determine that a network element meets the "impair' standard for the local exchange market, to grant competitors access – for that reason alone, and without further inquiry – to that same network element solely or primarily for use in the exchange access market."[199]

The Commission further explained that it "must gather evidence on the development of the marketplace for exchange access . . . before [it] can determine the extent to which denial of access to network elements would impair a carrier's ability to provide special access services," expressly acknowledging the need to make a distinct impairment finding as to access services before permitting unrestricted use of UNEs for that service.[200] In stark contrast to its earlier vacatur of the *UNE Remand Order* – where the Commission had, with one limited exception,

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[198] *Supplemental Order Clarification*, 15 FCC Rcd at 9594, ¶ 12 (use of a facility for local exchange service should not control the separate issue of that facility's use to provide special access).

[199] *Id.* at 9595, ¶ 14.

[200] *Id.* at 9596, ¶ 16 (emphasis added).

refused to make market-specific conclusions – the D.C. Circuit affirmed the *Supplemental Order Clarification* on this issue.[201]

Even as the D.C. Circuit found fault with the Commission's fundamental unbundling analysis, it continued to endorse the central principles affirmed by the *CompTel* court: "once the Commission found a single purpose as to which an 'element' met the impairment standard, no matter how limited," the Commission is not "forced to mandate provision of the element" for all purposes, "no matter how little impairment was involved in the remainder of the telecommunications field."[202]

1. The *Triennial Review Order* Constitutes a Significant Retrenchment at Odds With The D.C. Circuit

In the *Triennial Review Order*, the Commissioned jettisoned the safe harbors and local-use restrictions that it adopted in the *Supplemental Order* and the *Supplemental Order Clarification* (which were affirmed as lawful by the D.C. Circuit, and which included a restriction on the commingling by CLECs of EELs and tariffed special access services used for interoffice transmission). The Commission replaced these court-sanctioned measures with a general principle that Section 251 UNEs are available only for "qualifying services" – defined as "those telecommunications services that competitors provided in direct competition with the

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[201] *CompTel,* 309 F.3d at 14; *see id.* at 13 (Stating that the Commission was "clearly correct" that *Iowa Utilities Board* required it to reconsider its prior "all-encompassing," non-service-specific interpretation of 251(d)(2). Indeed, although the issue before the court of appeals involved whether it was permissible for the Commission to make service-specific distinctions, in accord with the holding in *USTA I*, the court went out of its way to make plain its skepticism that UNEs could be used for special access services without an impairment finding as to that separate market: "[I]t is far from obvious to us that the Commission has the power, without an impairment finding as to non-local services, to require that ILECs provide EELs for such services on an unbundled basis." *Id.*

[202] *Id.* at 13.

incumbent LECs' core services.[203] The Commission allowed carriers to request EELS for use in providing local exchange service, an obvious "qualifying service," but not for use exclusively for non-qualifying long distance service.[204] The Commission also eliminated the *Supplemental Order Clarification's* court-sanctioned "safe harbors" and UNE commingling restrictions, and in their place established new UNE "eligibility criteria."[205]

On review, the *USTA II* court vacated the Commission's impairment findings with respect to the component EEL facilities (high capacity loops and transport), but remanded the "limiting" portions of the Commission's new approach to EELs on the grounds that its "qualifying/non-qualifying service" distinction erroneously rested on the premise that long distance services are not "services" within the meaning of Section 251(d)(2) in the first place.[206] In doing so the Court of Appeals made clear that it earlier held in *CompTel* that the Commission had already "acted reasonably in disaggregating the impairment issue, and in ordering unbundling only with respect to the service for which it found impairment, and thus established that a service-by-service impairment analysis was permissible and that the Commission had made no impairment finding with respect to long distance services.[207]

In remanding, however, the *USTA II* court was emphatic that the remand does not invalidate the Commission's effort to prevent the use of EELs for long distance services:

> The CLECs have pointed to no evidence suggesting that they are impaired with respect to the provision of long distance services, and in *CompTel* we emphatically held that the Act did not bar a service-by-service analysis of impairment. The CLECs do not deny that they have been able to purchase use of

[203] *USTA II,* 359 F.3d at 590.

[204] *Id.*

[205] *Id.*

[206] *Id.* at 592.

[207] *Id.* at 591-92.

> EELs as "special access." As we noted with respect to wireless carrier's UNE demands, competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic.[208]

On remand, the Court observed that "the Commission will presumably turn to the issue of impairment" and "may well find none with reference to long distance service."[209]

In light of *USTA II,* the Commission should make clear that to the extent EELs remain available as UNEs, they may not be used to provide service for which no impairment exists. Specifically, carriers are not impaired in providing wireless, long distance, or competitive access services, and thus UNEs must not be used for these purposes. In order to prevent arbitrage, the Commission must enforce this quarantine by restoring the safe harbors, local usage requirements and commingling restrictions it eliminated in the *Triennial Review Order.*

2. The Commission Should Conduct A Service-Specific Impairment Analysis

Congress has permitted the Commission to require unbundled access to network elements only upon a finding of impairment in the provision of specific services: requesting carriers must be impaired in the "services that [they] seek[] to offer."[210] Every reviewing court has made plain that, as that language indicates, the Commission must make service-specific findings of impairment before a UNE can be used in providing a specific service

In *Iowa Utilities Board,* the Supreme Court squarely determined that a ny a ppropriate impairment test must consider the availability of facilities "outside the incumbent's network."[211]

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[208] *Id.* at 592.

[209] *Id.*

[210] 47 U.S.C. § 251(d)(2)(B).

[211] *Iowa Utilities Bd.*, 525 U.S. at 389.

Subsequently, the *USTA I* court instructed that it is impermissible to consider whether alternative facilities were "available" without defining a relevant product and geographic market. By "loftily abstract[ing] away all specific markets," the Commission, in its 1999 *UNE Remand Orde*r, had improperly ensured that "UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of that sort that might have [been] the object of Congress's concern."[212]

The Commission is therefore required to make market-specific judgments to ensure that unbundling is mandated only where it is appropriate, and not in markets where carriers can compete without access to UNEs. The Commission cannot support a decision to unbundle through impairment findings that are "detached from any specific markets or market categories," as was the case with the *UNE Remand Order*.[213] Thus, the Commission cannot require ILECs to provide UNEs in specific product markets, such as wireless and long distance, without determining whether CLECs are impaired in those markets.

The *USTA II* court has all but held that the competitive nature of the wireless and long distance markets, in combination with the long-time availability of special access offerings, preclude any finding of impairment with respect to wireless and long distance providers.[214] As demonstrated above, in the context of our discussion of entrance facilities, the Commission cannot find, as a matter of law, that wireless carriers or long distance providers are impaired in the provision of wireless or long distance service (or both).

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[212] *USTA I*, 290 F.3d at 422-23. It was precisely the failure to undertake such market-specific inquiries that rendered the *UNE Remand Order* unlawful.

[213] *Id.* at 426.

[214] *USTA II*, 359 F.3d at 575-77, 591-92.

3. UNEs Should Not be Available To Provide Wireless, Long Distance, or Competitive Access Services.

Overbroad unbundling can undermine facilities-based competition and is thus contrary to the "goals of the [1996] Act."[215] It is wholly inappropriate to mandate unbundling where a market already has significant competitive entry. [216] In the context of its discussion of both wireless and long distance provider access to UNEs, the *USTA II* court held that "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates, where robust competition in the relevant markets belies any suggestion that the lack of unbundling makes entry uneconomic.[217] In addition to the no impairment findings demonstrated above with respect to high capacity loops and transport generally, wireless carriers, IXCs and CAPs are not impaired without access to UNEs, as their past reliance on ILEC special access facilities has not made their entry into the wireless, long distance or competitive access markets uneconomic.

(a). Wireless

In a recent *ex parte*, Verizon demonstrated that, consistent with the Court's most recent and reaffirmed holdings in *USTA II*, wireless providers are one of several classes of high-capacity customers, services and facilities for which competition is particularly intense and for which there can be no finding of impairment.[218] This is consistent with the record that has been

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[215] *Iowa Utils. Bd.*, 525 U.S. at 388.

[216] *See USTA I*, 290 F .3d at 429 (determining that the Commission had a cted unlawfully in mandating unbundling in market that was already characterized by "'intense facilities-based competition'") (quoting Petitioners' Br. at 3).

[217] *USTA II*, 359 F.3d at 592; *see also id.* at 576 (wireless carrier's reliance on special access has not posed a barrier that makes entry uneconomic).

[218] "Verizon Competing Providers Are Successfully Providing High-Capacity Services to Customers Without Using Unbundled Elements," Verizon White Paper at 21-22, 24-26, submitted by letter from Michael E. Glover, Senior Vice President & Deputy General Counsel,

compiled in the context of the four wireless petitions for reconsideration of the *Triennial Review Order,*[219] which has been incorporated into this record.[220] As BellSouth, Qwest, SBC and Verizon demonstrated in opposition to these wireless petitions, the record developed in context of the *Triennial Review Order* demonstrates conclusively that the wireless market is highly competitive and wireless carriers are not impaired in the services they seek to provide.[221]

The Commission's Ninth CMRS Report supports this analysis. Issued after *USTA II,*[222] this Report provides additional evidence supporting a finding of non-impairment for the wireless industry. Notably, the Commission reported the wireless telephone industry increased subscribership by 13% to 161 million (compared to 185 million wireline access lines[223]), experienced 7% job growth (from 192,410 jobs in the wireless industry in 2002 to 205, 629 in 2003), increased capital investment 15% to $146 billion, up from $127 billion in 2002, increased average monthly minutes of use by 19% from 427 in 2002 to 507 in 2003, while competition resulted in the average revenue per minute decreasing 13% from $0.11 per minute in 2002 to

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Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98 & 98-147 (filed July 2, 2004) ("Verizon ex parte") (demonstrating, among other things, that wireless now accounts for approximately 43 percent of all long distance traffic).

[219] Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Public Notice, Report No. 2635 (Oct. 9, 2003); 68 F.R. 60391 (Oct. 22, 2003).

[220] *Notice*, ¶ 12.

[221] BellSouth Nov. 6, 2003 Opposition and Comments at 3-19, Qwest Nov. 6, 2003 Opposition at 1-6, SBC Nov. 6, 2003 Comments at 14-23, Verizon Nov. 6, 2003 Response at 30-36; BellSouth Nov. 17, 2003 Response at 1-8, SBC, Verizon, and Qwest Nov. 17, 2003 Reply.

[222] *See supra,* n. 66. After reviewing the Commission's two prior CMRS competition reports, the *USTA II* court observed that the amounts paid for spectrum "indicate that wireless firms currently expect that net revenues will, by a large margin, more than recover all their non-spectrum costs (including return on capital)." *Id.,* at 592, 576.

[223] *UNE Fact Report 2004* at Section II, B, 1. Not only are the numbers of wireless and wireline subscribers roughly equal, but also 20 million new wireless subscribers are added annually while wireline subscribers continue to decline. Thus, industry analysts expect that the number wireless subscribers will exceed the number of wireline access lines during 2005. *Id.*

$0.10 in 2003.[224] As stated *supra* concerning the intermodal switching alternatives, the Ninth Report shows wireless is ubiquitously available.[225]

Given the fully competitive wireless market, it would be simply ludicrous for wireless carriers to argue that they are "impaired." Indeed, in a recent, post-*USTA II ex parte,* one wireless carrier's written materials simply claim "the [s]tatutory standard is impairment, not whether [the] company would otherwise be driven out of all business segments in which it operates."[226] This fails completely to respond to the compelling record evidence to the contrary as well as the judgment of the D.C. Circuit, that with respect to the wireless market, "evidence already demonstrates that existing rates outside the compulsion of § 251(c)(3) don't impede competition."[227]

Further, as demonstrated in the record of the proceeding below, if the facilities sought by wireless carriers are such an integral part of their networks, the only economic explanation for wireless carriers not replacing special access circuits leased from ILECs with those of their own construction is that self-provisioning cannot yield significant savings. Thus, purchasing facilities as special access under tariff frees wireless carriers to pursue capital expenditures in other parts of their networks, for which economical leased options are not available from ILECs.[228] This

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[224] *Ninth CMRS Report* at Tables 1 and 9.

[225] As stated *supra* nearly 97% of all U.S. counties have three or more facilities-based wireless telecommunications competitors, while nearly 76% of all U.S. counties have six or more facilities-based wireless competitors, and nearly a third of all U.S. counties have seven or more facilities-based wireless competitors. *Id.* at 5.

[226] T-Mobile July 13, 2004 *ex parte*, CC Docket No. 01-338 attached presentation at 5, transmitted by letter from Gil M. Strobel, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC (July 21, 2004).

[227] *USTA II*, 359 F.3d at 576.

[228] BellSouth App. at 32. *USTA II,* 359 F. 3d at 592. NERA demonstrated that only seven percent of the nearly $4 billion that AT&T Wireless incurred in wholesale costs to provide wireless service, or $300 million, was spent on special access circuits. *Id.* at 127, ¶ 187. *See*

analysis is consistent with the Ninth CMRS Report and the evidence its demonstration of increased subscribership, minutes of usage, industry capital expenditures, jobs creation, and multiple, facilities-based competitors providing competitively priced services throughout, virtually, the entire country. Consequently, the wireless industry is not impaired nor entitled to UNEs.

(b). Long Distance

The same is true for the long distance industry. The D. C. Circuit observed that, "[t]he CLECs have pointed to no evidence that they are impaired with respect to the provision of long distance services..." and the Commission, if it turned to the issue of impairment for long distance providers on remand, "may well find none with reference to long distance service."[229] Since the *Triennial Review Order*, competitors have continued to compete successfully in the long distance market without relying on UNEs; AT&T, MCI and Sprint together provide 80 to 90 percent of the long-distance services sold to enterprise customers.[230] Moreover, as explained herein, the largest traditional long distance carriers are deploying or planning to deploy VoIP services – indeed, AT&T's new consumer strategy is to "migrate to [VoIP] and alternate access" so that it can "provide Local & Long Distance & Advanced Applications & Mobility – all on our own platform."[231]

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also BellSouth Corporation Opposition and Comments, CC Docket Nos. 01-338, 96-98 & 98-147 (filed Nov. 6, 2003).

[229] *USTA II,* 359 F.3d at 592.

[230] *UNE Fact Report 2004* at Section III, E, 2, c.

[231] *UNE Fact Report 2004* at Section II, A, 1.

High-capacity connections account for only part of the cost of providing long-distance services; robust competition evolved in this market well before UNEs were first made available. Indeed, long-distance carriers have been restricted from using UNEs exclusively to transport long-distance traffic.[232] Competition in the long distance market has continued to intensify since the *Triennial Review Order*, and is expected to continue to increase in the future. MCI, Global Crossing, and a number of other long-distance carriers operate their own, extensive high-capacity local access and transport facilities, and routinely use facilities operated by CLECs to reach wire centers and customers not situated on their own networks.[233] AT&T, MCI, and Sprint provide up to 80 to 90 percent of the long-distance services sold to enterprise customers, and remain the primary telecom service providers for 73% of corporate accounts.[234] Thus, as with wireless carriers, there is no basis to conclude that competition in the long distance market would be in any way impaired without access to unbundled network elements.

(c). Competitive Access Providers

Competitive access providers have deployed high capacity facilities in competition with ILECs since long before the 1996 Act.[235] For the Commission to disregard the facts in this record, and its own prior conclusions that competition exists for special access, and to mandate unbundling of high-capacity facilities for special access – especially in markets where the Commission has granted pricing flexibility – would be to engage in the same "disregard of the

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[232] *See Triennial Review Order*, 18 FCC Rcd at 17001-02, ¶¶ 24-25.

[233] *UNE Fact Report 2004* at Section III, E, 2, c.

[234] *Id.* at Section III, E, 2, c.

[235] *Id.* at Section III, A.

competitive context" that the D. C. Circuit found unlawful in *USTA I*.[236] Just as in that case, the Commission would be ignoring extensive evidence that the market is already characterized by extensive facilities-based competition and "inflict[ing] on the economy" the significant costs associated with unbundling "under conditions where it had no reason to think doing so would bring on a significant enhancement of competition."[237]

Accordingly, the Commission should adhere to its precedent in the *Supplemental Order Clarification*, and ensure that it does not permit access to UNEs for special access. The Commission limiting access to EELs (if at all) only to carriers who have carried their burden of demonstrating impairment with respect to the high capacity transport and loop components of the particular UNE sought in connection with local exchange service. It must deny access to EELs to wireless carriers, long distance providers, and special access providers. And it must enforce these market distinctions by tightening, significantly, the Commission's UNE (in general) and EEL (in particular) eligibility criteria on remand by restoring the safeguards established in the *Supplemental Order Clarification*.[238]

4. On Remand, the Commission Should Reinstate the *Supplemental Order Clarification's* Local Usage Requirements

Consistent with the 1996 Act, and the record established here, the Commission cannot reasonably conclude that merely because a CLEC may be impaired without unbundled access to a particular network element in order to provide local exchange service, the CLEC would otherwise be impaired without unbundled access to that same element to provide other services,

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[236] *See* BellSouth's discussion of high-capacity loops and transport, § VII above, as well as the *UNE Fact Report 2004* at Section III, *passim*.

[237] *USTA I*, 290 F.3d at 429.

[238] *USTA II*, 359 F.3d at 593 (because court already determined that it must remand, the Commission is free to "consider and resolve" anomalies in eligibility criteria).

such as wireless, long distance, and competitive access. Therefore, in addition to separate service-specific impairment findings for separate services (i.e., wireless, long distance, competitive access, broadband) the Commission must ensure accountability through significant restrictions on the use of any facility obtained on an unbundled basis at TELRIC rates to ensure that it is being used primarily, if not exclusively, in the market where impairment has been found. For these reasons, the Commission cannot be justified in maintaining the eligibility criteria adopted in the *Triennial Review Order*, which represent a significant erosion of its previous lawful use restrictions.

On remand, the Commission should reinstate the commingling restrictions and safe harbor/local usage requirements that it first adopted in the *Supplemental Order Clarification*, and that remain one of the few rules upheld by reviewing courts as reasonably related to the goals of the Act. The criteria adopted in the *Triennial Review Order* serve only to indicate that a CLEC has the *capability* to provide local service to a customer in a general area, not that the CLEC is in fact using the requested UNE to provide primarily local service. These criteria do not draw the line between telephone exchange (local) and access services that the Act, Commission and the Courts have hitherto recognized need to be kept separate. Even with the findings of non-impairment that the Commission is compelled to make on remand, the Commission can only achieve its goals by adopting criteria that will result in a demonstration that a particular circuit is actually being used to provide a significant amount of local service.

Without having a local usage requirement, under the current criteria there is nothing to ensure UNEs are primarily used for local services or to prevent the use of UNEs for services for which impairment does not exist, i.e., special access services, long distance wireless services, broadband services. In order to best address the anomalies that would otherwise occur and to

help provide a clear line between local and access services to ensure that UNEs are used for primarily local exchange service, the Commission should reinstate the local usage requirements of the *Supplemental Clarification Order* in their entirety.

IX. INTERPLAY BETWEEN SECTION 251 AND SECTION 271.

In the *Notice* the Commission seeks comment on how BOC Section 271 access obligations fit into the Commission's unbundling framework.[239] At a minimum, the Commission should clarify that Section 271 imposes no obligations on BOCs to unbundle "next generation," "broadband," or other advanced telecommunications and information service aspects of their networks. Specifically, the Commission should grant the relief requested in BellSouth's pending Petition for Clarification and/or Partial Reconsideration and clarify that it did not intend to require unbundling of broadband or next generation networks under Section 271.[240] The Commission should further clarify that states have no authority to impose unbundling obligations of any sort on BOCs pursuant to Section 271.

In the *Triennial Review Order*, the Commission recognized that, "broadband deployment is a critical policy objective that is necessary to ensure that consumers are able to fully reap the benefits of the information age."[241] To assure realization of this objective, the Commission decided to "refrain from unbundling incumbent LEC next-generation networks,"[242] explaining

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[239] *Notice,* ¶ 9, n.34. Section 271 of the Act sets conditions for BOCs to enter the interLATA long distance market. *USTA II*, 359 F.3d at 588. The fourteen point "competitive checklist" of Section 271(c)(2)(B) specifically addresses access to BOC network elements in five separate places. First, checklist "item two" requires BOCs to provide "nondiscriminatory access to network elements in accordance with the requirements of s 251(c)(3) and 251(d)(1)," while checklist items four, five, six and ten require BOCs to provide unbundled access to local loops, local transport, local switching and call-related databases. *Id.*

[240] BellSouth Petition for Clarification and/or Partial Reconsideration, (filed Oct. 2, 2003).

[241] *Triennial Review Order*, 18 FCC Rcd. at 17125, ¶ 241.

[242] *Id.*, ¶ 272.

that "applying 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in 706."[243]

The *Triennial Review Order* could not have been clearer that any forced unbundling of next generation networks would undermine incentives to deploy them by forcing BOCs to share with their competitors the potential benefits of investments whose risks are incurred solely by BOCs, and that any compulsory unbundling of broadband facilities would require BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts at considerable cost. In light of this, the *Triennial Review Order's* separate discussion of Section 271 issues (that does not mention broadband) caused BellSouth concern, because it appeared to give proponents of compulsory broadband unbundling an argument, however tenuous, that the broadband unbundling obligations eliminated by the Commission under Section 251 could be reimposed under Section 271.[244]

In its 1999 *UNE Remand Order*, the Commission had concluded that BOCs must continue to provide access to those network elements described in checklist items 4-6 and 10, even if such access is not mandated under Section 251 (and, therefore, checklist item 2).[245] In its *Triennial Review NPRM*, the Commission sought comment on how to evaluate a Section 271 checklist item where there is no unbundling requirement for the network element that

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[243] *Id.*, ¶ 288; ¶ 278 (excluding fiber to the home from unbundling "will promote [the] deployment of the network infrastructure necessary to provide broadband services to the mass market"), ¶ 290 (limiting the unbundling obligation for hybrid loops "promotes our 706 goals"), ¶ 541 (same for packet switching).

[244] *Triennial Review Order,* 18 FCC Rcd at 17384-85, ¶¶ 653-55.

[245] 15 FCC Rcd at 3906, ¶ 473.

corresponds to the checklist item,[246] and on the appropriateness of evaluating a tariffed service that corresponds to that network element.[247] Verizon, in particular, demonstrated in its comments and reply comments that once the Commission has determined that a network element is no longer necessary under Section 251(d)(2), and therefore no longer "listed" under Section 251(c)(3), the "corresponding" 271 checklist item should be construed as being satisfied.[248]

Despite this showing, the Commission, in its *Triennial Review Order*, continued to find a BOC unbundling obligation in Section 271 independent of the obligations applicable to all LECs in Section 251. Concerned that the Commission may have unintentionally handed proponents of broadband unbundling an opportunity to attempt to perpetuate the Commission's discredited,[249] and ultimately discarded,[250] broadband unbundling rules under the guise of Section 271 authority, BellSouth sought timely clarification and reconsideration of the pertinent parts of the *Triennial Review Order*. BellSouth requested that the Commission promptly clarify that it did not intend to require unbundling of broadband under Section 271.[251] All of the policy reasons that led to the Commission's conclusion not to require unbundling of broadband in the Section

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[246] Four of the Section 271 checklist items relate to network elements in earlier orders the Commission has deemed to be UNEs under the standards of 251(c)(3): local loop transmission from the central office to the customer's premises, unbundled from local switching or other services; local transport for the trunk side of a wireline local exchange carrier switch unbundled from switching or other services; local switching unbundled from transport, local loop transmission, or other services; and nondiscriminatory access to database and associated signaling necessary for call routing and completion. *Triennial Review Order* 18 FCC Rcd at 17382-83 ¶ 650.

[247] 16 FCC Rcd at 22814, ¶ 72.

[248] Verizon April 5, 2002 Comments at 66-67, Verizon July 17, 2002 Reply Comments at 54-59, CC Docket No. 01-338.

[249] *USTA I* 290 F.3d at 429 (vacating Commission's broadband unbundling rules)

[250] *Triennial Review Order* 18 FCC Rcd at 17323, ¶ 541 (declining to require the unbundling of broadband network elements).

[251] BellSouth Petition for Clarification and/or Partial Reconsideration (Oct. 2, 2003) at 10-12 ("BellSouth PFR").

251 context,[252] a decision upheld as reasonable by the *USTA II* court "in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband",[253] compel the Commission to issue this clarification.

In the absence of the foregoing clarification, BellSouth sought partial reconsideration of its determination with respect to how Section 271 access obligations fit into the Section 251 unbundling framework.[254] BellSouth showed that the Commission could reasonably interpret the Act in a manner that found that BOCs have no obligation to unbundle checklist items four, five, six, and ten when the corresponding network element no longer needs to be unbundled under Section 251, because the Commission's twenty-three *Section 271 Orders* consistently found that the Section 271 checklist access obligations are coextensive with those contained in its Section 251 unbundling rules for corresponding network elements; because a "perpetual unbundling requirement" under Section 271 was at odds with the *USTA I* decision;[255] because a reasonable interpretation of Section 271 that accords with cardinal principles of statutory constructions is that the checklist items four, five, six and ten reflect Congress's minimum expectations at the time the Act was passed in 1996, in the event that BOCs filed Section 271 applications prior to

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[252] *Triennial Review Order* 18 FCC Rcd at 17132-36, 17141-53, 17320-23, ¶¶ 255-63, 272-95, 535-41.

[253] *USTA II*, 359 F.3d at 585.

[254] BellSouth did not seek reconsideration of the Commission's determination with respect to the prices, terms and conditions of any Section 271 access obligations, including the Commission's refusal to mandate 251 pricing and combinations requirements for Section 271 elements. *Triennial Review Order* 18 FCC Rcd at 17386-89, ¶¶ 656-64 and n. 1990.

[255] *USTA I*, 290 F.3d at 427 ("each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities."), *see also Id.* at 424 (characterizing universal unbundling rules encompassing as many elements as possible as "completely synthetic competition").

the Commission adopting rules implementing Section 251;[256] and because Congress could not have intended to create the same disincentives to investment under Section 271 that it took pains to guard against in Section 251, particularly for broadband facilities that are not part of the BOCs' legacy networks and thus not subsumed in the market-opening imperative underlying Section 271.[257] Having properly eliminated broadband unbundling obligations under Section 251 in accordance with the Act and guidance from appellate courts, therefore, BellSouth argued that the Commission should adopt an interpretation of Section 271 that prevented these broadband obligations from being reimposed under the guise of Section 271.

Five months later, when the Commission had not decided BellSouth's request for clarification or partial reconsideration, BellSouth, out of an abundance of caution, filed its separate petition for forbearance.[258] BellSouth requested that, to the extent the Commission determines that Section 271 establishes an independent unbundling obligation on BOCs to provide unbundled access to network elements, even where the Commission has found that access to such elements is no longer necessary under the statutory impairment standard, the Commission forbear from applying any stand-alone unbundling obligations on broadband elements.[259] The next day, on March 2, 2002, the *USTA II* was issued, in which the court stated (without additional comment) that the Commission had "reasonably concluded" that checklist

[256] BellSouth PFR at 12-15.

[257] BellSouth Reply, CC Docket No. 01-338 *et al.*, at 8-9 (Nov. 17, 2003).

[258] BellSouth Petition for Forbearance (Mar. 1, 2004)

[259] *Id.* at 2. The BellSouth petition sought the same relief requested by Verizon in its separate Petition for Forbearance (filed Oct. 24, 2003), and sought the relief for broadband elements requested by SBC in a portion of its separate Petition for Forbearance (Nov. 6, 2003) and by Qwest in a portion of its separate Petition for Forbearance (Dec. 18, 2003).

items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by Section 251 and Section 252.[260]

USTA II does not foreclose other reasonable interpretations of Section 271,[261] including a statutory construction that rests on the legal arguments and analysis contained in BellSouth's petitions, the comments supporting BellSouth's petitions and the records generated by the other BOC forbearance petitions.[262] The Commission need not revisit its interpretation if it simply issues the clarification sought by BellSouth in its initial petition, and state unequivocally that

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[260] *USTA II*, 359 F.3d at 588. At the same time, the D.C. Circuit upheld three Commission determinations with respect to how Section 271's access obligations fit into the commission's unbundling framework. *USTA II*, 359 F.3d at 588-590. First, as noted above, the court commented that the Commission reasonably concluded that checklist items four, five, six and ten impose unbundling requirements for local loops, local transport, local switching and call-related databases that are independent of the unbundling requirements imposed by Section 251 and Section 252. *Id.* at 588 ("In other words, even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases in order to enter the interLATA market.") Second, the court upheld the Commission's determination that TELRIC pricing was not appropriate, in the absence of impairment, for elements for which unbundling may be required only under Section 271. *Id.* at 589 (upholding, under Chevron deference, the Commission's determination that the ruling criterion for access to these elements is the §§ 201-202 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory). And third, the court rejected claims to the contrary and upheld the Commission's finding that the independent Section 271 unbundling obligations do not include a duty to combine network elements. *Id.* at 590.

[261] BellSouth Reply Comments at 3 (Mar. 22, 2004).

[262] The Commission has incorporated the record generated by the petitions for reconsideration and clarification of the *Triennial Review Order*, including discussions of the broadband unbundling issues and Section 271 access obligations. *Notice* ¶ 12, n.40. *See* BellSouth Petition for Clarification and/or Partial Reconsideration at 10-16, BellSouth Reply at 8-9, Comments of SBC on Petitions for Reconsideration (Nov. 6, 2003) at 11-14; Response of Verizon to Petitions for Reconsideration (Nov. 6, 2003) at 5-15; Comments of the Hi-Tech Broadband Coalition on Petitions for Clarification and/or Partial Reconsideration (Nov. 6, 2003) at 4-7; Reply of Qwest Communications International (Nov. 17, 2003), *passim*; Consolidated Reply of Verizon to Oppositions to Petitions for Reconsiderations or Clarification (Nov. 17, 2003) at 4-9; Reply Comments of SBC on Petitions for Reconsideration (Nov. 17, 2003) at 11-18; *see also* Response of Telecommunications Research and Action Center (TRAC), et al. to Petition for Clarification and/or Partial Reconsideration (Nov. 17, 2003) at 9 (advocating no unbundling requirements for broadband generally); Letter from TRAC to the Hon. Michael K. Powell, *et al.*, CC Docket No. 04-242 (Aug. 27, 2002) (urging Commission to clarify that when it repealed the 251 unbundling requirements of the Telecommunications Act of 1996 it did not intend to leave similar requirements in place under Section 271, because it imposes significant uncertainty on the industry).

nothing in any of the Commission's rules or orders requires the unbundling of BOC broadband network elements, whether under Section 251 or Section 271.[263]

The Commission cannot reasonably find that unbundling broadband elements under Section 251 would "blunt the deployment of advanced telecommunications infrastructure," but that unbundling the same elements under Section 271 would not have the same pernicious effect. Any forced unbundling at potentially regulated rates would undermine incentives to deploy next-generation networks by forcing the BOC to share with its competitors the potential benefits of a risky investment. Moreover, such compulsory unbundling would force BOCs to redesign their networks in order to accommodate requests from competitors for individual piece-parts. Such re-design imposes considerable inefficiencies and added costs, precluding the BOC, which, like all competitors, has a finite supply of capital, from deploying broadband as extensively and efficiently as it otherwise could.[264] As Verizon recently explained:

> We have accepted the business risk of making the investments necessary to transform our network. We should not have to accept added regulatory risks on top of that, however. First, among those risks is the prospect that our broadband investments will be subject to unbundling obligations that undercut the economic case for this investment. That is all the more true given that experience has shown that, regardless of how those obligations are interpreted today, they inevitably will evolve and mutate over time in response to the currents and moods of the day, and in ways that continue to add costs to and undermine the economics of our investment.[265]

The Commission should therefore clarify that BOCs have no obligation to unbundle broadband elements under Section 271.

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[263] BellSouth Petition for Clarification at 10-12; TRAC Aug. 27, 2004 Letter to Michael Powell (the Commission's failure to make this simple clarification continues to prevent aggressive broadband deployment to consumers).

[264] BellSouth App. at 32.

[265] Letter from Thomas J. Tauke, Executive Vice President, Verizon, to the Hon. Michael K. Powell at 3 (under cover of letter from Dee May to Marlene Dortch, CC Docket No. 01-338 (Sept. 2, 2004).

Alternatively, the Commission should proceed upon the merits and the record of the pending BOC petitions for forbearance and forbear from requiring the unbundling of any broadband elements under Section 271. In addition, the Commission should reaffirm its lawful determinations with respect to the independence of competitive checklist items four, five, six, and ten from the requirements of Section 251, in particular the pricing standard appropriate for those items and the lack of any compulsion to make these items available in combination. The Commission should make clear that Section 271 places no unbundling obligations on BOCs greater than what the BOCs offer through their tariffed wholesale services. For example, checklist item 4 limits access to BOC "local loop transmission from the central office to the customer's premises, unbundled from local switching other services."[266] To the extent this establishes an access requirement for local loops even in the absence of CLEC impairment without access to local loops, this access cannot be expanded under Commission and judicial precedent to include all of the sub-loop elements or any other lawful requirements promulgated under Section 251.

The Commission also should make clear that states have no authority to: (1) order unbundling of network elements pursuant to Section 271; or (2) compel access to BOC's local loops, local transport, local switching, and call-related databases under the guise of Section 271 on terms inconsistent with those established by this Commission. The Commission made clear in the *Triennial Review Order* that the prices, terms and conditions of Section 271 checklist item access, and a BOC's compliance with them, are within the Commission's exclusive purview in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to Section 271(d)(6). However, state commissions, urged on by CLEC

[266] 47 U.S.C. § 271(c)(2)(B)(iv).

proponents of broadband unbundling, are attempting to assert their own jurisdiction over this kind of access grounded, erroneously, in Section 271.[267]

For instance, in the *UNE Remand Order*, the Commission made one narrow exception to circuit switch unbundling, denying unbundling for local circuit switches serving customers with four or more lines in the highest-density zone in any of the top 50 Metropolitan Statistical Areas ("MSAs").[268] Earlier this year the Tennessee Regulatory Authority issued an order purporting to set a rate for these "carved-out" switches, citing its authority under "Section 271 of the Act."[269] Shortly thereafter, a CLEC filed petitions in seven states in BellSouth's region seeking the exercise of state commission jurisdiction under the "authority" of Section 271 over line-sharing. Even though the obligation to provide line sharing as an unbundled network element was vacated by the Court of Appeals in *USTA I*,[270] was repudiated by this Commission in the *Triennial Review Order*,[271] and was held not to satisfy the impairment standard by the D.C. Circuit in *USTA II* some state commissions appear poised to require that line sharing be made available under Section 271.[272]

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[267] Letter from Dee May, Verizon to Marlene H. Dortch, CC Docket No. 01-338 (July 27, 2004) at 1 ("Examples of CLEC Comments Urging State Commissions to Perpetuate Non- 251 Unbundling Obligations Under 271").

[268] *USTA I*, 290 F.3d at 420-21, 423.

[269] BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action (July 1, 2004) ("BellSouth TRA Preemption Petition").

[270] 290 F.3d at 429.

[271] *Triennial Review Order* 18 FCC Rcd at 17135, ¶¶ 260-61.

[272] On September 21, 2004, the Georgia Public Service Commission ("GPSC") voted to adopt its staff's recommendation "that line sharing arrangements continue to be ordered and billed" at the rates, terms, and conditions currently in effect beyond October 1, 2004, the date by which the *Triennial Review Order* stated that new line sharing arrangements would no longer be required. Although a written order has not yet been entered, the GPSC staff was persuaded that the transition mechanism established by the Commission in the *Triennial Review Order* should not be permitted to take effect until the GPSC has the opportunity to examine the scope of BellSouth's unbundling obligations under Section 271 in a generic proceeding. *See* Staff

In its Petition for Preemption, BellSouth demonstrated that state commissions have no jurisdiction over elements provided pursuant to Section 271.[273] Section 271 vests authority exclusively in the Commission to "regulate" network elements provided pursuant to that and for which no impairment has been made.[274] The only role that Congress gave the state commissions in Section 271 is a consultative role during the Section 271-approval process.[275] State commissions' authority to approve interconnection agreements entered into "pursuant to section 251," to impose arbitrated results under Section 251(c)(1) in order to ensure that any agreements

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Recommendation, In re: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to 252(b) of the Telecommunications Act of 1996, Docket 19144-U (dated September 14, 2004) (BellSouth App. at 25).

In Louisiana, the Staff of the Louisiana Public Service Commission ("LPSC") has determined that, "[a]bsent a definitive pronouncement from the FCC . . . BellSouth has a continuing obligation to provide line sharing, in accordance with its grant of 271 authority." Staff's Brief Concerning the 47 U.S.C. § 271 Status of Line Sharing, In re: Petition for Arbitration of Interconnection Agreement Amendment With BellSouth Telecommunications, Inc. Pursuant to 252(B) of the Telecommunications Act of 1996, Docket No. U-28027 (Sept. 10, 2004) (BellSouth App. at 26). Likewise, according to the Public Staff of the North Carolina Utilities Commission ("NCUC"), the line sharing transition mechanism established by the Commission applies only to BellSouth' s unbundling obligations under 251, and BellSouth has "an on-going 271 obligation to make line sharing available to new customers of [competitive LECs] on and after October 2, 2004." Public Staff Comments on Line Sharing, In re: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to 252(b) of the T telecommunications Act of 1996, Docket No. P-775, Sub 8 (Sept. 10, 2004) ("NC Staff Comments") (BellSouth App. at 27).

[273] BellSouth TRA Preemption Petition at 6-11.

[274] 47 U.S.C. § 271. For example, Section 271(d)(1) provides that to obtain interLATA relief, a BOC "may apply to the Commission for authorization to provide interLATA services." Congress gave the Commission the exclusive authority for "approving or denying the authorization requested in the application for each State." 47 U.S.C. §271(d)(3). "It is," the Commission has determined, "the Commission's role to determine whether the factual record supports a conclusion that particular requirements of 271 have been met." *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, 13 FCC Rcd 539, 555, ¶ 29 (1997). And once a BOC obtains Section 271 authority (as BellSouth has in each of the 9 states in which it provides telephone exchange and exchange access service) continuing enforcement of Section 271 obligations, by the express terms of the statute, rest solely with the Commission. 47 U.S.C. § 271(d)(6).

[275] 47 U.S.C. § 271(d)(2)(B).

"meet the requirements of section 251," and to set rates under Section 252 "for purposes of" the interconnection and access to network elements required by 251(c)(2) and (c)(3) are specifically limited by the terms of the statue to implementing Section 251 obligations, not Section 271 obligations. The Commission, of course, refused to graft Section 251 pricing and combination requirements onto Section 271 in its *Triennial Review Order*,[276] a decision upheld by the *USTA II* court, which characterized the cross-application of § 251 to § 271 as "erroneous."[277] In sum, Section 252 grants state commissions' authority only over the implementation of Section 251 obligations, not Section 271 obligations.[278]

Congress could have specified that states have authority to establish the rates, terms, and conditions for purposes of the competitive checklist under Section 271, but it did not do so. That choice must be respected. As the Commission has properly explained, Congress intended that a single federal agency, not 51 separate state bodies, exercise "exclusive authority" over "the Section 271 process."[279] In the D.C. Circuit's words, Congress "has clearly charged the FCC, and not the State commissions," with assessing BOC compliance with Section 271. The 1996 Act contemplates a single federal arbiter of compliance with Section 271, including reviewing the rates, terms, and conditions imposed by that section.

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[276] *Triennial Review Order,* 18 FCC Rcd at 17386-89, ¶¶ 656-664.

[277] *USTA II*, 359 F.3d at 590.

[278] *See also MCI Telecomm. Corp. v. BellSouth Telecomms. , Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (requirement that ILEC negotiate items outside of Section 252 is "contrary to the scheme and the text of that stature, which lists only a limited number of issues on which incumbents are mandated to negotiate. See 47 U.S.C. §§ 251(b), (c) (setting forth the obligation of all local exchange carriers and incumbent local exchange carriers, respectively)."

[279] *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, *Memorandum Opinion and Order*, 14 FCC Rcd 14392, 14401, ¶ 18 (1999).

It is unlawful for a state commission to ignore such findings by relying upon self-conferred Section 271 authority. A state may not apply its own policies in establishing rates, terms, and conditions for facilities that must be provided solely under the authority of Section 271, and any such conclusion would be inconsistent with Congress's evident intent to give this Commission "exclusive" decision-making authority under Section 271.[280] Thus, especially when it comes to broadband, the Commission must make clear that it alone is authorized to resolve these issues so as to create the certainty that can be provided only by a coherent and uniform approach to such federal-law issues. By contrast, allowing 51 different states to impose their own disparate views on broadband would "create a labyrinth of rate, terms, and conditions" that "violates Congress's intent in passing the Communications Act."[281] Accordingly, the Commission should grant the relief requested in BellSouth's pending petition for preemption, and, among other things, declare that states have no authority to r egulate elements provided pursuant to Section 271.

X. THE COMMISSION SHOULD ADOPT A LIMITED TRANSITION PLAN

Under the Commission's Interim Order, in the absence of a Commission ruling that switching, dedicated transport, and/or enterprise market loops must be made available pursuant to Section 251(c)(3), ILECs are obligated to make available switching as part of the UNE platform as part of a twelve-month, two-phase transition period.[282] During the first phase, the so-called "Interim Period", which lasts until the earlier of six months after Federal Register publication of the *Interim Order* or the effective date of new rules adopted by the Commission in this proceeding, ILECs must continue to provide unbundled access to UNEs under the same

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[280] *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

[281] *Boomer v. AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002).

rates, terms and conditions that applied under their interconnection agreements as of June 14, 2004.

During the second phase, the so-called "Transition Period," which lasts for six months following the expiration of the Interim Period, or the effective date of a new rules adopted by the Commission in this proceeding, ILECs, in the absence of a Commission ruling that switching is subject to unbundling, must lease the switching element to CLECs at no more than $1 higher than the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, or (2) the rate established by the state public utility commissions, if any, between June 16, 2004 and September 4, 2005. Individual element rates for enterprise market loops and dedicated transport also must be made available until September 4, 2005 and the prices are similarly capped at 115% of the higher of the two foregoing benchmarks.[283] ILECs must make these elements available only to their existing (embedded) customer base (as of June 15, 2004).

At any time during this period the Interim and Transition periods, carriers are free to negotiate alternate arrangements superceding the Commission's rules and state public utility commission rates, and ILECs are free to invoke, at any time, the change of law provisions in their interconnection agreements to incorporate relevant changes applicable to these relationships.

The Interim Period and Transition Period adopted in the *Interim Order* represent the absolute outer limits of any transition plan that the Commission can or should adopt in this proceeding, and should in fact be tailored to reflect the record in this proceeding. ILECs have

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[282] *Interim Order*, ¶ 29.

[283] *Id.*

been subject to over eight years of virtually unlimited unbundling under three successive sets of Commission rules that have been struck down as unlawful. Especially in the absence of any impairment findings, the Commission must end the ruinous and economically distortive UNE regime immediately.

The Chairman has committed to adopt final unbundling rules before the end of 2004. The Commission should publish the full text of an order immediately after its adoption and establish an effective date of its new unbundling rules no later than 30 days after publication of its new rules in the Federal Register, which should be no later than January 31, 2005, in light of the Chairman's commitment. Under the express terms of the *Interim Order,* this is the latest possible date that the "phase-two" Transition Period established in the *Interim Order* begins to run. Any compelled unbundling in the absence of a definitive finding of impairment by the Commission beyond January 31, 2005, nearly nine years after the effective date of the 1996 Act itself, would be unconscionable.[284] Further, the Commission should adopt, as part of any transition it adopts, the following clarifications:

- where the Commission has determined there to be no impairment, as with broadband facilities generally, any narrowband facilities, and for any facility for which the Commission has made no affirmative impairment finding, states have

[284] USTA and other ILECs have requested that the D.C. Circuit vacate the FCC's interim rules and ensure that the FCC makes new rules *effective* by the end of the year. *United States Telecom Association, et al. v. Federal Communications Commission and United States of America,* Nos. 00-1012, *et al.*, Petition for Writ of Mandamus to Enforce the Mandate of this Court (D.C. Cir., Aug. 23, 2004) ("Pet."). Petitioners have also demonstrated that, absent a lawful unbundling decision by the FCC, ILECs cannot be forced by the Commission or any state commission to unbundle. *See* Pet. at 20-22. BellSouth agrees with the mandamus petitioners that the Commission should not, through inaction or otherwise, be allowed to undermine the statute and avoid the preclusive effect of its decisions on the states. Reply Brief in Support of Petition for a Writ of Mandamus to Enforce the Mandate of this Court (Sept. 27, 2004), D.C. Cir. Nos. 00-1012 *et al.,* at 13-15. To the extent the relief requested in the mandamus petition is granted, it would, of course supersede the January 31 date proposed by BellSouth above.

no authority under federal or state law to order unbundling for a corresponding facility.

- ILECs and carriers may negotiate access to ILEC network facilities that have been "de-listed" as UNEs or that have never been qualified as UNEs through commercial agreements that may be made publicly available pursuant to Section 211(b), but need not be filed with, or approved by, any regulatory authority.

XI. CONCLUSION

The Commission must act promptly to restore certainty to the telecommunications industry by adopting a narrow and rational impairment standard consistent with the 1996 Act and by adopting the proposal set forth in BellSouth's Comments.

Respectfully submitted,

BELLSOUTH CORPORATION

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Date: October 4, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 4th day of October 2004 served the parties of record to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic mail to the parties listed as follows:

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